No. 89-7272-CSY
Status: GRANTED

Title: Ronald Allen Harmelin, Petitioner
v.
Michigan

Docketed:
April 2, 1990

Court: Court of Appeals of Michigan

Counsel for petitioner: Harmelin,Ronald, Johnson,Carla J.

Counsel for respondent: Modelski,Michael J.

Entry	Date	Note	Proceedings and Orders
1	Apr 2 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 3 1990		Brief of respondent Michigan in opposition filed.
4	May 9 1990		DISTRIBUTED. May 24, 1990
6	May 29 1990		Petition GRANTED. limited to Question III presented by the petition.
			**********
7	Jun 15 1990	G	Motion of petitioner for appointment of counsel filed.
8	Jun 15 1990		Distributed. June 21, 1990. (Motion of petitioner for appointment of counsel).
9	Jun 28 1990		Motion for appointment of counsel GRANTED and it is ordered that Carla J. Johnson, Esq., of Detroit, Michigan, is appointed to serve as counsel for the petitioner in this case.
11	Jun 28 1990		Order extending time to file brief of petitioner on the merits until August 13, 1990.
12	Aug 13 1990		Brief amicus curiae of Criminal Defense Attorneys of Michigan filed.
13	Aug 13 1990		Brief amici curiae of ACLU, et al. filed.
17	Aug 13 1990		Brief of petitioner Roy Allen Harmelin filed.
14	Aug 21 1990		Record filed.
		*	1 vol.-Michigan Supreme Court.
15	Aug 21 1990		Joint appendix filed.
16	Aug 27 1990		Brief amicus curiae of National District Attorneys Assn. filed.
19	Sep 11 1990		Order extending time to file brief of respondent on the merits until September 24, 1990.
20	Sep 19 1990		Brief amicus curiae of United States filed.
21	Sep 20 1990		Brief amicus curiae of Prosecuting Attorneys Assn. of Michigan filed.
22	Sep 24 1990		Brief of respondent Michigan filed.
23	Sep 24 1990		Brief amici curiae of Washington Legal Foundation, et al. filed.
24	Sep 24 1990		Brief amicus curiae of Arizona filed.
25	Sep 24 1990		Brief of respondent Michigan filed.
30	Sep 26 1990		SET FOR ARGUMENT MONDAY, NOVEMBER 5, 1990. (3RD CASE)
26	Sep 28 1990		CIRCULATED.
27	Oct 9 1990	G	Motion of petitioner to strike non-record material filed.
28	Oct 15 1990		DISTRIBUTED. Oct. 26, 1990. (Above motion).
29	Oct 17 1990		Answer of respondent to petitioner's motion to strike nonrecord material filed and distributed.
31	Oct 29 1990		Motion of petitioner to strike non-record material

No. 89-7272-CSY

Entry	Date	Note	Proceedings and Orders
			GRANTED. The respondent is directed to reprint the brief.
32	Oct 29 1990	X	Reply brief of petitioner Harmelin filed.
33	Nov 5 1990		ARGUED.

EDITOR'S NOTE

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89-7272 (2)

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD HARMELIN,

Petitioner,

v

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

RONALD HARMELIN
In Proper Persona
188131
Scott Regional Correctional Facility
Plymouth, Michigan 48170

Supreme Court, U.S.
FILED
APR 02 1990
JOSEPH F. SPANIOL, JR.
CLERK

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89-7272

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Respondent.

PROOF OF SERVICE

I, the undersigned, hereby certify under penalty of perjury that one copy of Petition for Certiorari, Motion to Proceed in Forma Pauperis, Affidavit in Support, and other supporting documents has been served on Frank J. Kelley, Attorney General, State of Michigan, 525 West Ottawa Street, 760 Law Building, Lansing, Michigan, 48913, and Oakland County Prosecutor, 1200 N. Telegraph Road, Pontiac, Michigan 48055, by mail.

Ronald Harmelin
Ronald Harmelin, Petitioner

Subscribed and sworn to before
me this 29th day of March, 1990.

Bethany K. Thomas
Notary Public Bethany K. Thomas
My commission expires: 8-4-93

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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Petitioner,

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STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

Ronald Harmelin, petitioner in pro per and in forma pauperis, respectfully prays that a Writ of Certiorari issue from this Honorable United States Supreme Court to review the decisions of the Michigan courts in this case on constitutional issues of major importance.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SEARCHES AND SEIZURES VIOLATED THE FOURTEENTH AMENDMENT AND THE TRIAL COURT ERRED BY FAILING TO SUPPRESS THEIR FRUITS.

II. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE RIGHT TO PLEAD NOT GUILTY WHERE DESPITE HIS PLEA OF NOT GUILTY, HIS ATTORNEY FAILED TO ARGUE THAT THE TRIAL RECORD PROVIDED A BASIS FOR FINDING THE DEFENDANT NOT GUILTY.

III. WHETHER THE MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

IV. WHETHER THE STATE COURT OF APPEALS' LACK OF JURISDICTION TO REVERSE THEMSELVES ON THEIR OWN MOTION VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

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STATEMENT OF THE CASE

Defendant-Petitioner Ronald Harmelin was convicted of possession of more than 650 grams of cocaine and possession of a firearm in the course of a felony, in a bench trial in the Oakland County Circuit Court, a state court of Michigan, before the Hon. Gene Schnelz. On April 30, 1987, Judge Schnelz imposed the mandatory sentences required by statute: life imprisonment without possibility of parole, with 2 years consecutive on the gun charge (ST-3,4).

On May 12, 1986, Oak Park Police stopped the car of Defendant Ronald Harmelin for going through a red light at a turn-around without stopping (EH-10). Ultimately, the police searched his person and the trunk of his car and found cocaine. An evidentiary hearing on a motion to suppress the fruits of the searches and seizures was held before the Hon. Robert C. Anderson on November 12, 1986 and January 12, 1987. Judge Anderson denied the motion on January 12, 1987 (EH2- 59,60).

The defendant made a timely appeal to the Court of Appeals. On January 9, 1989, the Court of Appeals, Judges Wahls, Hood, and N.J. Kaufman issued an unpublished opinion reversing the defendant's conviction ruling that a police officer, after stopping an automobile for a traffic violation, may not order the driver to exit the car, and thus protract the detention, unless the test announced in Terry has been fulfilled, i.e. unless the officer had a reasonable, articulable suspicion that the driver committed or was about to commit a crime.

The Oakland County Prosecutor filed Leave to Appeal to the Mich Supreme Court and the Defendant filed a Brief Opposing Leave. On March 9, 1989, the Court of Appeals, sua sponte, vacated its judgment in the case and retained the matter for reconsideration. The defendant filed a motion to vacate the order of March 9, 1989, due to lack of jurisdiction. The Court of Appeals summarily denied that motion.

On April 18, 1989, the Court of Appeals released for publication a new opinion affirming defendant's conviction. People v Harmelin, 176 Mich App 524 (1989).

Defendant applied for Leave to Appeal to the Michigan Supreme Court. That application was summarily denied on January 29, 1990. People v Harmelin, 434 Mich 863 (1990).

FACTS OF THE CASE

In the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. The officers observed the defendant's car exiting the parking lot. They were called away on other police business.

Later, they observed defendant's car entering the motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of the defendant's car, the officers noticed nothing unusual or illegal in the manner in which the defendant's car was being driven. They could not see who was driving.

Shortly after 5:00 a.m., the officers saw defendant's car make a turn-around without making a complete stop at a red light (EH1- 8-10). The officers activated their overhead lights and defendant pulled over in a prompt fashion. (EH1-25; EH2- 7,23) Officer Rix approached the driver side of the defendant's car, while Officer Blakeney stayed back by the passenger side of the police car (EH2-25). Officer Rix asked the defendant for his driver license, registration and proof of insurance, and defendant handed him the three items (EH1-11). Defendant then exited the car.

The officers could not remember whether they ordered him out of the car (EH1-27), although Officer Rix testified that under certain circumstances, he would ask a driver to exit the vehicle (T-66). These circumstances are if the driver takes evasive action,

movement while stopping the car, prior information on problems, or if the driver is extremely nervous (T-67). Officer Rix testified that none of these circumstances were present in the instant case at the time the defendant was still in the car (T-68).

Defendant was not observed committing any crime, and did not threaten the officers by word or deed or otherwise act suspiciously (EH1-25,36,37;EH2-25,26,35;T-67,68).

After the defendant was out of the car, Officer Rix went to the rear of the defendant's vehicle (T-69). The defendant followed him back there (T-69). As they were walking to the back of the car, the defendant spontaneously told Officer Rix that he had a CCW permit and a gun in an ankle holster (T-71). That was the first thing the defendant had said, as far as Officer Rix can recall (T-71).

The defendant handed the CCW permit and inspection certificate to the officer (EH1-11). The license was a general unrestricted permit to carry a concealed weapon (EH1-32). Nothing about the document appeared irregular and there was nothing about it that led the officer to conclude that it was not a valid CCW permit (T-74). The officer knew that a CCW permit allows the bearer to carry as many weapons as he may wish (T-75).

Officer Rix testified that he sometimes does a pat down when he stops a person for running a red light, it depends on the circumstances (EH1-37). The unusual circumstance in this instance was that the defendant had a CCW permit and a gun in an ankle holster (EH1-38). Officer Blakeney testified that Officer Rix told him "we're going to do a pat down, he has a gun in an ankle holster."(EH2-27).

Officer Blakeney testified that the defendant appeared "a little bit nervous" (EH2-28), specifically when the officers "told him to put his hands on the car he did so in a jerky type manner"(EH2-29). Officer Rix testified he observed bulges in the defendant's jacket pockets which he thought might be more weapons (EH1-12). Officer Rix explained that "I've been in a situation once

before where a man drew a gun on me , pointed it at me and I wa almost killed. I'm not going to go through that again." (EH1-34).

Officer Rix first noticed the bulges before the defendan handed him the CCW permit (T-78). Officer Rix testified that th defendant followed Rix back to the rear of the car (T-69). Office Rix doesn't remember the defendant saying anything before he sai he had a CCW permit (T-71). Officer Blakeney grabbed the area tha bulged the most (EH2-31;EH1-78). He felt a hard object and aske what it was.(EH2-9) The defendant replied "That's my marijuana. The biggest bulge and the object Blakeney thought was a weapon wa a thin, flat cigarette case (EH2-34). Officer Blakeney opened th case and found marijuana cigarettes inside (EH1-13,79). Th officers then did a complete search of the defendant and found te packets of white powder, three little vials of white powder an assorted pills (EH1-14).

The officers impounded the car "for forfeiture" and searche the trunk of the car back at the police station (EH1-,14,15,56).

While searching the trunk, Rix opened a zippered travel ba and there was "a pile of cash" (EH2-41). They then closed the trun and went to find a superior officer (T-118). Blakeney was excite by finding the money (T-142). Further search revealed a larg amount of cocaine inside a closed shaving kit inside the close travel bag (T-142).

Officer Blakeney did not recall any specific departmenta policy regarding closed containers with regard to inventor searches (T-124). He did not recall if there was any specifi departmental policy concerning opening of bags or suitcases (T 126). Officer Blakeney believes that there is no specific polic as to opening containers (T-130). There is no policy that superior officer must be present at the inventory search tha Blakeney knows of (T-133) and no written policy as to inventory o closed containers (T-165).

REASONS FOR GRANTING THE WRIT

I. THE SEARCHES AND SEIZURES VIOLATED THE FOURTEENTH AMENDMENT AND THE TRIAL COURT ERRED BY FAILING TO SUPPRESS THEIR FRUITS.

Police stopped the car of Defendant Ronald Harmelin for going through a red light at a turn-around without stopping (EH-10). Ultimately, police searched his person and the trunk of his car, and found cocaine. A motion to suppress the fruits of the searches and seizures was denied.

In the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. The officers observed the defendant's car exiting the parking lot. They were called away on other police business. They observed defendant's car entering the motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of the defendant's car, the officers noticed nothing unusual or illegal in the manner in which the defendant's car was being driven. They could not see who was driving.

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if the driver is extremely nervous (T-67). Officer Rix testified that none of these circumstances were present in the instant case at the time the defendant was still in the car (T-68).

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Officer Rix first noticed the bulges before the defendant handed him the CCW permit (T-78). Officer Rix testified that the defendant followed Rix back to the rear of the car (T-69). Officer Rix doesn't remember the defendant saying anything before he said he had a CCW permit (T-71). Officer Blakeney grabbed the area that bulged the most (EH2-31;EH1-78). He felt a hard object and asked what it was.(EH2-9) The defendant replied "That's my marijuana." The biggest bulge and the object Blakeney thought was a weapon was a thin, flat cigarette case (EH2-34). Officer Blakeney opened the case and found marijuana cigarettes inside (EH1-13,79).

The officers then did a complete search of the defendant and found ten packets of white powder, three little vials of white powder and assorted pills (EH1-14).

The officers impounded the car "for forfeiture" and searched the trunk of the car back at the police station (EH1-,14,15,56).

While searching the trunk, Rix opened a zippered travel bag and there was "a pile of cash" (EH2-41). They then closed the trunk and went to find a superior officer (T-118). Blakeney was excited by finding the money (T-142). Further search revealed a large amount of cocaine inside a closed shaving kit inside the closed travel bag (T-142).

Officer Blakeney did not recall any specific departmental policy regarding closed containers with regard to inventory searches (T-124). He did not recall if there was any specific departmental policy concerning opening of bags or suitcases (T-126). Officer Blakeney believes that there is no specific policy as to opening containers(T-130). There is no policy that a superior officer must be present at the inventory search that Blakeney knows of (T-133) and no written policy as to inventory of closed containers (T-165).

A. The frisk of his person.

The question at issue here is whether advising a police officer that one is carrying a licensed weapon, and presenting the license and inspection certificate, entitles the officer to pat down or search the individual. The stop of the vehicle to issue a traffic ticket was one intrusion on Fourth Amendment interests, a legally authorized intrusion. The frisking and searching of the defendant and his car constitute separate and distinct intrusions on Fourth Amendment rights.

After the legitimate stop to issue a non-custodial civil infraction citation, the officer committed a second intrusion, a "stop and frisk" of the sort sometimes authorized by Terry v Ohio, 392 U.S. 1; 88 S.Ct. 1868; 20 L.Ed.2d 889 (1968) under certain circumstances.

Ordinarily, the possession of a concealed weapon is itself a crime, and an officer can seize the contraband item. However, a lawfully possessed weapon is not lawfully subject to seizure, and therefcre cannot reasonably be the subject of a search. Pursuant to the terms of the general CCW, any weapon found on Mr. Harmelin could not be seized, and would have to be returned to him (EH1-32).

The "pat-down" search for weapons constitutes an intrusion on Fourt Amendment rights. Terry v Ohio, supra. "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." Terry, supra. In this case, the defendant was leaning with his hands against his car, with his legs spread, while two officers searched him (EH1-39,40).

Under Terry, the police officer is permitted to intrude on a citizen's Fourth Amendment privacy and make a pat-down "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is

afoot an that the persons with whom he is dealing may be armed and presently dangerous." Terry, 30.

Here, as in People v Burrell, 417 Mich 439 (1983), "No specific inferences of criminal activity could possibly be drawn from these facts." Mr. Harmelin's car approached a red light at a left lane turn-around. The officer observed the car "slowed, hit it's brakes, but just kept going." (EH1-23). Other than that, the defendant's driving was not unlawful in any way. He did not attemptto flee (EH1-25). He produced a driver license, registration and proof of insurance. He spontaneously informed the office that he had a CCW permit which he produced and informed the officer of the gun in the ankle holster.

Both officers testified that the defendant was nervous; Officer Rix testified that other than the defendant being nervous there was nothing else unusual about him "but I would rather have the elements of surprise with me than with him" (T-79). Officer Blakeney testified that the defendant was " a little bit nervous" (EH2-29) specifically, when the officers "told him to put his hands on the car he did so in a jerky type manner" (EH2-29).

Officer Rix testified he observed bulges in the defendant's jacket pockets which he thought might be more weapons (EH2-12). Officer Rix explained that "I've been in a situation once before where an man drew a gun on me, pointed it at me and I was almost killed. I'm not going to go through that again." (EH1-34). Oddly enough, Rix testified that he noticed the bulges before the denfendant handed him the CCW permit (T-78) yet Rix testified that the defendant followed Rix to the back of the car (T-69). Therefore, we must conclude that Rix turned his back on the defendant and the bulges that so concerned him. An even more telling fact is that the police allowed the defendant's gun itself to go untouched while the officers searched his coat (EH1-40-43). The officers showed far more interest in the contents of his cigarette case that in his gun.

Another telling fact is that the biggest bulge turned out to be a "thin flat cigarette case" (EH2-31;EH1-78). The record

seems to suggest that the only reason the police patted down the defendant was because he was seen three times leaving the Embassy Motel, a location where crimes have occurred in the past, and he had a gun in an ankle holster. The mere fact that the defendant was seen leaving the Embassy Motel would not justify a search. The only other circumstance that the police articulated was that the defendant was either "extremely" or "a little bit" nervous, especially when he was told to put his hands on the car. However, any citizen would be a little bit nervous when directed to "spread 'em" by two uniformed officers and for apparently no reason other than making a rolling stop at a stop sign.

Mr. Harmelin was stopped for a civil infraction, not a criminal offense. Arrest was not a possibility (T-36). Defendant took no action that caused the officer to fear for his safety (EH1-25,36-37;EH2-25,26,35).

These circumstances are very much like People v Gonzales, 356 Mich 247 (1959), where the Michigan Supreme Court stated:

> "The officers had no reason to suspect any violation of the law other than the traffic offense for which the summons was issued to Leal. Further, we feel the record clearly shows that the officers had no intention of incarcerating Leal or detaining him any further. There were no fruits of the traffic offense to search for, nor any need to search for the means by which it had been committed. And since mo further detention was comtemplated there was no need to search for weapons or other means of possible escape from custody."

The officers in Gonzales were in the habit a "checking cars quite thoroughly at that time" apparently referring to the early hours of the morning. Officer Rix in the instant case testified that he searched Mr. Harmelin "because he had a gun" (EH1-12). Yet Mr. Harmelin had a legal right to carry that gun just as he had a legal right to leave the Embassy Motel that night.

Circuit Court Judge Anderson ruled that the frisk was lawful because "it appeared to someone, the police. that something wasn't 100 percent." (EH2-60). This ruling is precisely what the Fourth Amendment was enacted to protect against--arbitrary interference with basic human dignity in our cities.

Judge Anderson heard two days of testimony by the officers, and the appellate courts generally give deference to the trial

court because they are able to judge the credibility of the witnesses. After two days of testimony, he felt that the officers had frisked the defendant "because something wasn't 100 percent." This conclusion does not reach the standard required by Terry v Ohio.

The Court of Appeals reversed the trial court in their first opinion. The panel apparently felt that Mr. Harmelin was searched for no reason. Their second opinion, which defendant concludes was the result of ex-parte communications (see issue IV), concludes:

> "[I]t was reasonable to conclude that criminal activity might have been afoot and that the defendant might have been armed and dangerous."
> --People v Harmelin, 176 Mich App 524, 532 (1989).

What criminal activity might have been afoot? The officers testified that the Embassy Motel was a drop off spot for stolen cars, but the defendant's car was completely legal. And if the defendant was dangerous, why would he tell the officers that he had a gun and a permit?

The defendant submits that the trial court correctly summed up the testimony of the police officers, that they had no reason to frisk Mr. Harmelin. Of course police officers would feel safer if they were allowed to routinely frisk everyone they encounter, but this is precisely what the Fourth Amendment prohibits. The fact that Officer Rix had been shot before, and he didn't like the fact that the defendant had a licensed weapon in an ankle holster is no justification for this frisk. The fact that the biggest bulge the officers saw turned out to be a "thin, flat cigarette case" suggests that the real reason for the search was not because they wanted to be sure he had no other weapons, but that they were just searching for evidence of other crimes.

There was no justifiable reason for the frisk in this case, and therefore the evidence and its fruits should be suppressed. US Const, Amend IV. Since all the evidence in this case flowed from the illegal frisk, the evidence should be suppressed and the defendant discharged. Wong Sun v United States, 371 U.S. 471; 83 S.Ct. 407; 9 L.Ed.2d 441 (1963).

B. The examination of the cigarette case.

If a frisk were lawful, it must still be confined to the cause for the frisk, i.e., to look for dangerous weapons. Terry v Ohio, supra at 29. The officer therefore had no right either to look inside the "little flat" cigarette case (EH 1,45) or ask about its contents.

Defendant, at the time of the frisk, was leaning with his hands against the car, with his legs spread. (EH1,39-40). This was not a casual interview in the person's own office. Rather, defendant was clearly "deprived of his freedom of action in a significant way". Miranda v Arizona, 384 U.S. 436, 444; 86 S.Ct. 1602; 16.L.Ed 2d 694 (1966). The questioner was looking for incriminating answers, but failed to give warnings required under Miranda v Arizona. The questioning was therefore unlawful, and the subsequent opening of the cigarette case, based on the answer to the questioning, was the fruits, and again must be suppressed, along with the fruits of the marijuana arrest. Dunaway v New York, 442 U.S. 200; 99 S.Ct. 2248; 60 L.Ed.2d 824 (1979).

C. The impoundment of the car.

The police indicated that they impounded Mr. Harmelin's car and did a routine inventory search of the vehicle. The Court of Appeals, however, found that the record in this case established that the Oak Park Police Department's standardized procedures did not mandate searching and conducting an inventory search of every container within an impounded vehicle; and that therefore the inventory search done in this case does not fall within the parameters of Colorado v Bertine, 479 U.S. 738; 107 S.Ct. 738; 93 L.Ed.2d 739 (1987). In Bertine, the United States Supreme Court held that the Fourth Amendment does not prohibit an inventory search by police if the police follow standardized procedures. They added in footnote 6 on page 742:

> "We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria. See Lafayette, 462 U.S., at 648, 103 S.Ct. at 2610; Opperman, 428 U.S. at 374-5; 96 S.Ct. at 3099-3100.

Since the police officers in this case did not know if there was a specific departmental policy regarding the inventory of closed containers (T-124,130,133,165), they could not have been following standardized procedures. Thus, the evidence in the instant case was recovered in violation of Colorado v Bertine, and should be suppressed.

The Michigan Court of Appeals opined that the search in this case falls within the automobile exception to the warrant requirement enunciated in United States v Ross, 456 U.S. 789; 102 S.Ct. 2157; 72 L.Ed.2d 572 (1982)

In Ross, the police were acting on information from a reliable informant that there were narcotics in a certain automobile trunk, and that a certain person would be driving the automobile. The officers stopped the defendant, opened the trunk, and discovered heroin in a closed container. The police then drove the car to the station, searched it more thoroughly, and discovered a zippered pouch containing cash. At no time did the officers attempt to obtain a warrant. The United States Supreme Court held that police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within may conduct a warrantless search of the vehicle as thorough as a magistrate could authorize in a warrant.

The Ross case does not apply to this case for two reasons. The first reason is that these police officers testified that they were conducting an inventory search. This search was invalid because they did not follow standardized procedures. Therefore the search was not a legal one. Furthermore, Ross and the "automobile exception" do not address inventory searches.

The Michigan Supreme Court addressed this latter issue in People v Long (On Rem), 419 Mich 636. In Long, police followed the defendant because he was speeding. Long got out of the car and from

his demeanor, the police formed the opinion he was "under the influence of something." The police followed Long as he moved back toward the car, and they saw a knife on the floorboard. Shining a light in the interior of the car, the officer saw something under the armrest. It was a pouch of marijuana. The police decided to impound the car. The deputy opened the trunk and found 75 pounds of marijuana. The government argued the search was a valid inventory search. In footnote 2, page 648, the Michigan Supreme Court said:

> "2. Plaintiff, in a brief footnote, concludes that the search of the trunk may have arguably been a search incident to defendant's arrest. We decline to rule on that question as the argument is not relied upon or developed in this case. Nor does the plaintiff rely upon the "automobile exception" to the warrant requirement in order to justify the search of the trunk. Cf. United States v Ross, [456] U.S. [798];(search of closed container in automobile). **Furthermore, Ross and the automobile exception do not address inventory searches. Id, p 809,fn 11.** [Emphasis added].

The Michigan Supreme Court was correct in its careful reading of Ross, which does not address inventory searches and should not be read to condone a constitutionally invalid inventory search.

Secondly, in Ross, the police had been told by an informant there were drugs in the trunk. In Harmelin's case, the police had no such knowledge. As a matter of fact, the Oak Park Police were surprised and excited to discover money in Mr. Harmelin's trunk--so excited that they hurriedly close the trunk back up and go to get a superior officer.

The true issue here is whether or not this was a valid inventory search. The testimony of the officers shows that the Oak Park Police Department's standardized procedures did not mandate searching and conducting an inventory of the contents of every container within an impounded vehicle such as the defendant's; thus, the inventory search done in this case was invalid under Colorado v Bertine, supra.

D. The search of containers and their contents.

Upon opening the trunk, the officers found a shaving kit with other containers inside, and opened them and searched them. The opening of closed containers, without a warrant or probable cause, was unlawful. United States v Chadwick, 433 U.S. 1;97 S.Ct. 2476; 53 L.Ed.2d 538 (1977).

A car trunk, while not completely safe, is universally considered to be a reasonably safe place to store personal goods. If the defendant trusts his own car trunk as safe, the police have no real need to search the trunk for the defendant's "own protection". A defendant can waive virtually any right, including the right to trial itself. In a society with a Fourth Amendment, where the right to privacy in personal effects is supposed to be protected, a citizen may choose to leave his property locked in a car trunk at minimal risk, without having it searched by police.

Defendant concludes that the frisk of his person, and all the police actions thereafter, were unlawful, and that the fruits, i.e., all items found on Mr. Harmelin and in his car, must be suppressed. U.S. Const, Amend IV.

II. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE RIGHT TO PLEAD NOT GUILTY WHERE, DESPITE HIS PLEA OF NOT GUILTY, HIS ATTORNEY FAILED TO ARGUE THAT THE TRIAL RECORD PROVIDED A BASIS FOR FINDING THE DEFENDANT NOT GUILTY.

Defendant Ronald Harmelin was charged with knowing and intentional possession of over 650 grams of cocaine and possession of a firearm during a felony. He pled not guilty. Defense counsel Curtis Rundell presented a Motion to Suppress the evidence on the ground of illegal search, which was denied by the Hon. Robert Anderson before trial. A bench trial was then held before the Hon. Gene Schnelz.

Defense counsel gave an opening argument. (T 21-24). The argument, however, did not discuss anything at issue in the trial. The opening argument dealt entirely with the question of illegal search. Counsel did not suggest any reason to question the Defendant's guilt. Indeed, after discussing the search question, counsel stated, "From there on, I have no argument with the prosecutor's opening statement in terms of recitation of facts." (T 24).

After examination of Officer Rix, counsel cross-examined him. (T 50-89). However, all of the questioning dealt with the issue of search. Counsel began by inquiring into whether there was a basis for stopping the car in the first place. (T 51-63). Counsel then moved on to whether Defendant did anything to justify the pat-down search. (T 66-89). His questioning was in most respects simply a rerun of the questioning from hearing on the Motion to Supress. This excerpt is typical of the questioning (T 84-85).

"Q Did you tell Officer Blakeney why you were going to do a pat-down search?

A No. I just told him Harmelin had a gun.

Q Why did you do a pat-down search?

A I was afraid for our safety.

Q What else was there about Mr. Harmelin that prompted you to decide to do a pat-down search?

The main difference between defense counsel's questioning at the evidentiary hearing and the trial was that at trial counsel added questioning designed to question whether the officers really did or did not see bulges in the coat. (T 76-82). Clearly, whether the officer really did or did not see bulges in the coat was relevent only to the legality of the officer's actions, and was not relevant to the issues at trial: whether Defendant Harmelin knowingly and intentionally possessed over 650 grams of cocaine found in by the officers in his car trunk.

The situation with the second officier was similar. The officer was questioned about the inventory search, the impoundment and search policies of the Oak Park Police Department, etc. (T 120-133). He was also ask about whether there was discussion about getting a search warrant, and what made the officer "suspicious." (T 136-7) Counsel established in detail the steps taken by the officier to discover the cocaine that was found in the trunk. (139-142).

He then returned to the officier's actions, thoughts and motivations during the search of Defendant's person (T 145-151). Counsel then recalled Officer Rix, and had Defendant put on the jacket with the items restored to the pockets, to demonstrate that the alleged bulges could not really be seen. (T 153-158). He moved on to the circumstances of the trunk search, in what order things were searched, and how those actions measured up to the departmental policies. (T 159-168).

In closing argument, defense counsel reargued the suppression issue. See T 176:

> "First, prior to the comencement of the proofs this morning I asked to renew my motion or motions with regard to suppression of evidence in this matter, and I recognize that there does seem to be a body of case law that indicates that a circuit judge is not in a posture or position to overrule a determination on an issue previously rendered by yet another circuit judge, particularly of the same circuit, I suppose.
> However, the testimony in this case has now brought to light certain factors..."

The closing argument dealt entiraly with the legality of the search. See, e.g., 177: "at that point in time it was incumbant upon him, having abandoned the search, to secure an appropriate warrant to allow the search of that vehicle." See, e.g., T 183: It is, I submit, a clear violation of the rights assured us by our Constitution of the United States and by the State of Michigan, which are a right secure in our premises and our person." Counsel concluded his argument as follows (T 184):

> "MR RUNDELL: ...I would ask the Court therefore to rule that the evidence seized was seized inappropriately, is not admissible, and therefore cannot be considered by the Court in rendition of a verdict and thus, the case must fall and the defendant should be discharged.

Present counsel concedes that Mr. Rundell did a competent and professional job at rearguing the suppression motion to Judge Schnelz during the course of the trial, although it would have been better for him to cite to People v Sacorafas, 76 Mich App 370 (1977), expressly giving the successor judge power to redetermine admissibility rulings made by the first judge.

The problem is that Mr. Rundell did not put on any kind of a trial defense whatsoever. He did not give the judge any cause to think the Defendant might be innocent, nor did he argue that the elements of the offense were not adequately proven. He did not contest the guilt of the Defendant in any way.

In Wiley v Sowders, 647 F2d 642, 648-649 (CA 6, 1981), the Court held:

> "The decision to pled 'guilty' or 'not guilty' is a decision reserved soley for the accused based on his intelligent and voluntary choice...
> An attorney may not stipulate to the functional equivalent of a guilty plea."

Similarly, the Sixth Circuit, in Martin v Ross, 747 F2d 1245 (CA 6, 1984), granted habeas corpus, stated:

> "Martin's trial counsel 'stood mute,' offering the jury virtually no choice but to convict him, in spite of his plea of not guilty'. CF. Wiley, 647 F2d at 650 (constitutional right not to plead guilty obliges attorney to 'structure the trial of the case around the client's plea.')."
> The situation in the instant case is virtually identical

to that in Wiley and Martin. The only argument made by defense

counsel did not urge a not guilty verdict. In other words, counsel argued to Judge Schnelz in his capacity as judge determining admissibilty of evidence, but made no argument at all to Judge Schnelz in his capacity as trier of fact in a trial.

Defense counsel offered the trier of fact "virtually no choice but to convict him, in spite of his plea of 'not guilty'". Martin v Rose, supra. By failing to present any argument that the prosecutor's case was not proven, defense counsel failed to structure the trial around his client's plea of not guilty. The so-called "trial" was nothing more than a suppression hearing coupled with "the functional equivalent of a guilty plea." Wiley v Sowders, supra.

In accord, see also United States v Cronic, 466 U.S. 648, 659; 104 S.Ct. 2039; 80 L.Ed.2d 657 (1984), finding a denial of right to counsel where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." See also, People v Fisher, 119 Mich.App. 445 (1982); People v Carter, 41 Ill.App. 425; 354 N.E.2d 482 (1976). and People v Hattery, 109 Ill. App.2d 449; 488 N.E.2d 513 (1986), each of which found ineffective assistance of counsel where counsel failed to advocate the client's position of guilty.

Mr. Harmelin concedes that, if admissible, the evidence against him was quite strong. However, whether the evidence is weak or strong, the Defendant is entitled to plead not guilty, and is entitled to have an attorney argue that the prosecutor's case has not been proven.

As an example, the Michigan statute requires that possession be knowing and intentional. MCL 333.7403. Counsel could have structured the case around the theory that the elements of knowledge and intent were not proven, because there was no direct evidence that Defendant knew the drugs were in the trunk. Even when evidence is overwhelming, a plea of not guilty means the defense counsel must put on a defense. As the Court held in People v Hattery, supra, 488 NE2d at 519:

> "Although counsel's strategy may have been reasonable in light of the evidence--a point we need not consider-

> -it was an impermissible one. Even when no theory of the defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt."

Defendant was deprived of effective assistance of counsel. Strickland v Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); People v Garcia, 398 Mich 250 (1976); Martin v Rose, supra; Wiley v Sowders, supra; United States v Cronic, supra. Defendant was deprived of his right to plead not guilty. Martin v Rose supra; Wiley v Sowders, supra.

Ineffective assistance of counsel is manifest, with or without an evidentiary hearing. Pursuant to People v Ginther, 390 Mich 436 (1973), an evidentiary hearing should have been ordered to determine this issue of ineffective assistance of counsel. However, even without further evidentiary support, a new trial is required to remedy this Sixth Amendment violation.

III. THE MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Defendant Ronald Harmelin was convicted of possession of over 650 grams of cocaine. Pursuant to statute, MCL 333.7403, Judge Schnelz imposed the mandatory sentence of life imprisonment without possibility of parole.

The U.S. Constitution bans punishments for crimes which constitute cruel and unusual punishment. U.S. Const, Amend VIII. The federal and state courts have long recognized the judicial duty to set aside sentences violating these provisions. Weems v United States, 217 U.S. 349; 30 S.Ct. 544; 54 L.Ed.2d 637 (1983).

The length of sentence alone is a valid ground for finding cruel and unusual punishment. Solem v Helm, 463 U.S. 277; 103 S.Ct.3001; 77 L.Ed.2d 637 (1983). The Eighth Amendment prohibits "sentences that are disproportionate to the crime committed." Solem v Helm supra.

Considering proportionality of the sentence to the crime, there is no other crime in Michigan for which the punishment is mandatory life without parole except for first degree murder. A person with a long criminal record could commit the foulest atrocities, such as holding people capitive for years as sexual slaves, hacking off limbs, or poking out eyes of children, or attempting to assassinate public officials, without even the possibility of receiving a sentence as high as Ronnie Harmelin. In contrast, Ronnie Harmelin, for possessing a substance one can buy freely and legally on the streets of Peru, had to receive a sentence of life without parole regardless of how the judge evaluated his character. The judge was compelled by statute to ignore the fact that Ronnie had absolutely no criminal record, that he harmed no one, that he did not display viciousness, that he did not demonstrate an inability to reform.

If the substance in Ronnie's trunk had turned out to be over 650 grams of cyanide, enough to kill hundreds of thousands of innocent people, he would have gone completely unpunished. Even if the police found with the cyanide a note in the Defendant's handwriting outlining a plot to use the cyanide to poison municipal water supplies, he still could not be punished as harshly as he has been for possessing cocaine.

No other jurisdiction in the United States has penalties even coming close to the harshness of Michigan's. People v Harman, 124 Mich App 93, 104 (1983) (partial concurrences of M. Kelly, J.). Indeed, under federal law, if a first offender possessed the same amount of cocaine as did Mr. Harmelin, the maximum penalty would be a term of not less than 5 or more than 40 years in prison. 21 U.S.C. S841 (b)(1)(B)(ii). If that same first offender possessed more than 5 kilograms of cocaine (eight times the amount of cocaine possessed by Defendant Harmelin), the maximum penalty would be a term not less than 10 years or more than life. 21 U.S.C. S84(b)(1)(B)(ii). He would be eligible for parole after serving 1/3 of the sentence, or ten years in the case of a life sentence or sentence of more than 30 years. 18 U.S.C. S4205(a).

The federal provisions are themselves quite harsh, but do not even begin to approach the unspeakable cruelty of the present Michigan provisions. The judge cannot give a sentence of less than life, and the Parole Board cannot issue a parole, ever.

In applying the evolving standards of decency test described in Solem v Helm, we look in part to the vast discrepancy between the Michigan provisions and those of other American jurisdictions. We look also to the fact that judges such as Judge Norman Lippitt of Oakland County have refused to sentence people under this Act, refusing to become a party to the barbarity of these provisions (as reported in the newspapers). We also look to the fact that at least two judges of the Michigan Court of Appeals, as well as former Judge Bert Hensick of Livingston County, have reached the conclusion that this extreme penalty is inconsistent with the constitutional guarentees against cruel and unusual punishment. See

People v Harman, supra, (partial concurrence of M.J. Kelly, J.) People v Harding, 163 Mich App 298 (1987)(dissent D.E. Holbrook, P.J. More recently, Judge Vera Massey Jones of Detroit Recorder's Court sentenced a defendant who was convicted by a jury of possession of over 650 grams of cocaine. The judge refused to sentence him to mandatory life without parole, instead sentencing the defendant to 40 -100 years incarceration. See People v Dwight Rashad, #88-011275.

Rehabilitation is another factor to be considered in the cruel and unusual punishment analysis. Locked in prison for life, what possible incentive can Ronnie Harmelin and others like him have to turn from drugs? Indeed, isn't the likeliest outcome that people like Ronnie, thrown into the pit of prison for all eternity without the hope of release, will turn to drugs even more?

To be thrown into prison for life, without possibility of release, really is a horrible thing to happen to a person. To take away everything that people hope and dream for in their lives, the big things and the little things, forever, with no hope of redemption, is a most profoundly harsh thing for a Government to do to one of its citizens. Such a punishment may well be appropriate recompense for the most vicious of cruelities. But, what about a nonvicious person who makes a mistake in judgment?

Surely, some people who get involved with drugs must be capable of rehabilitation. Judge Douglas Ginsburg, despite admitted drug involvement, is considered fit to sit as a Judge on the U.S. Court of Appeals for D.C. Circuit. The record is unmistakeably clear that persons involved in drugs are capable of reform.

In Solem v Helm, this Court held that it was not proportional to give a nonviolent offender a life sentence that deprives him of all hope of release. The statutory scheme compelling a sentence of life without parole regardless of individual circumstances cannot be justified under either authority.

Defendant incorporates by reference into this argument the well-reasoned opinion of Judge Kelly in People v Harman. Counsel is aware that in Harman and Harding themselves, as well as a few other cases, the Michigan Court of Appeals majorities have rejected the claim of cruel and unusual punishment. Counsel submits that a hundred or even a thousand such judicial decisions could not make right that which is so clearly wrong. Judges in Salem, Massachusetts undoubtly approved the burning of witches at the stake, but their approval could not make it right. Our descendants will look back on this peculiar period of our history with horror and shame, much as we now look back on our ancestors' practice of setting fire to eccentric old women for the good of the community.

The Court of Appeals decisions approving this practice have used reasoning that could approve a life sentence for any crime. for example, in People v Harman, 124 Mich App at 98, approving the holding in People v McCarty, 113 Mich 464 (1982), that the sentence was constitutional, the Court stated:

> "The bases for this holding, with which we agree, were that the mandatory life sentence for the offense to prevent the offender from causing injuries to others by reason of involvment with large quantities of cocaine and society's need to deter individuals from engaging in the proscribed conduct."

Every sentence is intended to prevent the offender from causing injuries to others, and to deter individuals from engaging in proscribed conduct. The reasoning of McCarty and Harman would justify a mandatory sentence of life without parole for every crime.

The reasoning of these cases fails to discuss why it is prpportional that a first offender guilty of this crime should be given this horrifying treatment, while even repeat offenders guilty of rape, robbery and attempted murder are not treated this harshly. The reasoning that the mandatory life sentence will prevent the offender from causing injuries to others by reason of involvement with large quantities of cocaine and society's need to deter individual's from engaging in the proscribed conduct would only be valid if the defendants in these cases were the drug kingpins. Instead they seem to be merely the "mules" of transport and when

arrested are easily replaced by new personnel. This mandatory sentence law does nothing to deter the real drug kingpins, nor does it help protect society from drugs.

The common sense of society, as reflected in the laws of 49 states and the US, is that proportional sentencing demands a sentencing scheme more humane than what Michigan has enacted. The very purpose of the Eighth Amendment is to correct such deviations from proportionality when they arise.

IV. THE COURT OF APPEALS LACKED JURISDICTION TO REVERSE THEMSELVES ON THEIR OWN MOTION.

Defendant-Appellant RONALD HARMELIN was convicted and sentenced in Oakland Circuit Court. The Court of Appeals reversed his conviction in an unpublished opinion dated January 9, 1989 because of an unconstitutional seizure. The Oakland County Prosecutor filed a timely Application for Leave to Appeal in the Supreme Court. The Court of Appeals then issued an order on March 9, 1989, vacating the judgment of January 9, 1989.

The defendant filed a Motion to Vacate Order of March 9, 1989 in the Court of Appeals. The Court denied that motion and issued a new opinion affirming the defendant's conviction on April 18, 1989.

In Michigan, once a claim of appeal is filed in a higher court, the lower court lacks jurisdiction in the case until the higher court acts. Moffit v Sederlund, 145 Mich App 1 (1985); People v George, 399 Mich 638 (1977); People v Kennedy, 384 Mich 339, 343 (1971).

The cases consistently hold that the filing of an Application for Leave to Appeal in a higher court vests jurisdiction in that court. The only matters that the lower court can retain some jurisdiction on is a collateral question such as bond. The lower court lacks jurisdiction over all other matters. People v Wells, 403 Mich 809 (1978).

The Michigan Statute on point, MCL 600.314; MSA 27A.314, provides: "the decisions on appeal of the court of appeals are final, except as reviewed by the supreme court as provided by supreme court rule."

The court rule, MCR 7.201(D), states:

> The court shall sit to hear cases in panels of three judges. The decision of a majority of the judges of a panel in attendance at the hearing is the decision of the court. Except as modified by the Supreme Court, a decision of the court is final.

The decision of a majority of the judges of the panel in attendance at the hearing in the instant case was that an illegal

seizure had occurred. Neither party made a motion for reconsideration. Neither party cited the authority the Michigan Court of Appeals relied upon to reverse themselves. The defense can only conclude that the court was influence by some sort of ex parte communication or political pressure. Even the hint of impropriety cannot be tolerated in the judiciary.

The Michigan's courts' failure to follow their own rules violated due process. U.S. Const., Amendment XIV. When a court acts outside of its jurisdiction, the defendant's right to due process is also violated. The Michigan Court of Appeals decision of January 9, 1989 was final and should be reinstated.

CONCLUSION

Petitioner Ronald Harmelin respecfully submits that, for the reasons stated above, the Michigan courts of last resort have interpreted the United States Constitution in ways that conflict with prior rulings of this and other courts, both federal and state courts of last resort. The resulting injustice of a man punished for life without parole under the circumstances of this case, is compelling reason for the United States Supreme Court, the individual's last resort to grant Ceriorari either by plenary consideration or summary reversal.

Respectfully submitted,

Ronald Harmelin

Ronald Harmelin,
In Proper Persona
188131
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Dated: 3-29-90

APPENDIX

1. Michigan Court of Appeals Opinion, 1/9/89
2. Michigan Court of Appeals Order (vacating), 3/9/89
3. Michigan Court of Appeals Order (denying rehearing), 4/18/89
4. Michigan Court of Appeals Opinion (reconsideration), 4/18/89
5. Michigan Supreme Court Order (denial of leave), 1/29/90
6. Affidavit of Defendant-Petitioner, 1/5/88
7. Newspaper Clipping, Detroit Free Press, 4/29/89
8. Newspaper Clipping, Michigan Lawyers Weekly, 3/20/89

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

RONALD ALLEN HARMELIN,
Defendant-Appellant.

JAN 0 9 1989

No. 101536

Before: Wahls, P.J., Hood and N.J. Kaufman*, JJ.

PER CURIAM

Defendant, Ronald Allen Harmelin, was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2), and was sentenced on April 30, 1987, by the Oakland Circuit Court to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. On appeal, defendant argues that his convictions must be reversed because the evidence against him was obtained as a result of an unconstitutional seizure and pat-down search of his person and an unconstitutional search of his car; that his convictions must be reversed because he was deprived of the effective assistance of counsel; and that his sentence for the cocaine conviction must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constittutes cruel and unusual punishment. We find that defendant's convictions must be reversed because the evidence used against him was obtained as a result of an unconstitutional seizure of his person.

The record reveals that in the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles.

*Retired Court of Appeals judge, sitting on the Court of Appeals by assignment.

Numerous stolen vehicles had been found in this lot in the past. At this time, the officers observed defendant's car exiting the parking lot, and although they were called away on other police business at various times that morning, they saw defendant's car entering the Embassy Motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of defendant's car, the officers noticed nothing unusual or illegal in the manner in which defendant's car was being driven.

Shortly after 5:00 a.m., while continuing to patrol the area around the Embassy Motel, Officers Rix and Blakeney saw defendant's car make a U-turn at the intersection of Eight Mile and Hubbell Roads, a high-crime area, without stopping for a red light. When the officers, in their patrol car with its overhead lights flashing, pulled behind defendant's vehicle, defendant responded by stopping in a reasonably prompt fashion. Officer Rix walked to the driver's side of defendant's car, while Officer Blakeney positioned himself at the passenger side of the car. Defendant, who remained seated in his car, complied in a cooperative manner upon being requested by Officer Rix to produce a driver's license and vehicle registration. Defendant then stepped out of his car. Neither of the officers could recall whether defendant was ordered out of his vehicle or whether he got out of it on his own initiative, although Officer Rix testified that if he did in fact order defendant out of the car, that order would have been prompted solely by the nervous behavior exhibited by defendant -- behavior described as defendant's having "trouble getting some of the words out." In any event, after exiting his car, defendant, in a nervous manner, informed Officer Rix that he was carrying a pistol concealed in an ankle holster. He explained that he had a permit for the weapon, however, and that he did not want the officers to become alarmed. He then handed Officer Rix a general permit to carry a concealed weapon as well as a safety inspection certificate for the .38 caliber, five-shot revolver, which was later found in his ankle holster.

After looking at the firearm documents proffered by defendant, Officer Rix observed nothing which suggested that the papers were possibly invalid. Nonetheless, because defendant appeared to be nervous, because he was armed, albeit legally, and because he had a bulge in one of his coat pockets, Officer Rix, fearing for his own safety and sensing that "[t]here was something wrong," decided to conduct a pat-down search of defendant. In doing so, some marijuana was discovered, and defendant was placed under arrest.

In searching defendant after his arrest, the officers found other incriminating evidence in defendant's possession, including assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper. Later, pursuant to the standard policy of the Oak Park police department, defendant's car was impounded for a possible forfeiture action, and an inventory search was conducted. During this search, a satchel containing a shaving-kit bag was discovered in the trunk. The kit contained $2900 in cash and two bags of white powder subsequently determined to be 672.5 grams of cocaine. A fingerprint expert testified that defendant's fingerprints were found on books located inside the satchel and next to the bags of cocaine.

Defendant neither testified in his own behalf nor presented any witnesses.

On appeal, defendant first argues that the detention and pat-down search conducted by the police violated his Fourth Amendment right to be secure against unreasonable seizures and did not fall within the stop-and-frisk exception to the warrant requirement first enunciated in Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), because the detention and search could not be justified by any articulable suspicion or objective manifestation that he was engaged, or about to be engaged, in criminal activity. In Terry, the locus classicus of stop-and-frisk law, the United States Supreme Court created a limited exception to the requirement of showing probable cause in the

seizure of a person by a police officer if the officer had a reasonable, articulable suspicion that the person committed, or was about to commit, a crime. Under the Terry rule, once an officer has reasonably concluded that criminal activity may be afoot, he can conduct a pat-down search if he reasonably concludes that the person seized may be armed and dangerous. See People v Payton, 166 Mich App 428, 430-431; 421 NW2d 191 (1988); People v Peyton, 167 Mich App 230, 236-237; 421 NW2d 643 (1988). In the present case, defendant, prior to trial, moved to suppress the narcotics evidence against him on the ground that the detention and pat-down search to which he was subjected violated his Fourth Amendment rights. Of course, it is well established that evidence derived from an illegal seizure must be suppressed as the "fruit of the poisonous tree." Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); People v Shabaz, 424 Mich 42, 65; 378 NW2d 451 (1985), cert dis ____ US ____; 106 S Ct 3326; ____ L Ed 2d ____ (1986). The trial court denied defendant's pretrial suppression motion. This Court will not disturb a trial court's ruling on a suppression motion unless that ruling is clearly erroneous. Payton, supra, p 430; Peyton, supra, p 235; People v Burrell, 417 Mich 439, 448; 339 NW2d 403 (1986). We will find such a ruling clearly erroneous if firmly convinced that a mistake has been made. People v Daniels, 160 Mich App 614, 617; 408 NW2d 398 (1987).

In the present case, defendant, without doubt, was lawfully stopped for running a red light, which is a civil infraction, MCL 257.611; MSA 9.2311; People v Laube, 154 Mich App 400, 407; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987). It seems fairly clear that after defendant was lawfully stopped and produced his driver's license and vehicle registration, Officer Rix ordered defendant to get out of his car. Although defendant did not testify, and thus did not inform the court that he was in fact ordered out of his car, and although Officer Rix could not remember whether he ordered defendant out of his car or whether defendant exited the automobile of his own accord, it seems

highly unlikely to us that, under the circumstances presented in this case, defendant would have gotten out of his car without being told to do so. The question thus becomes whether this escalation in the intrusiveness of the stop was justified by the traffic violation alone and, if not, whether the additional detention was supported by a reasonable, articulable basis on the part of the police for suspecting criminal activity. We are mindful, during our examination of this matter, that "the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention." Burrell, supra, 457.

With respect to the Fourth Amendment of the United States Constitution, the reasonableness of requesting a driver to get out of a vehicle following a lawful traffic stop has been answered by the United States Supreme Court in Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). In Mimms, a majority of the Supreme court held that a police officer's order to a driver to exit his car after the car was lawfully stopped for a traffic violation did not violate the Fourth Amendment, even though the officer had no reason to suspect foul play at the time, since the obvious interest in the officer's safety outweighed the de minimus intrusion involved in what was described as "at most a mere inconvenience" to the driver. 98 S Ct 333. The Mimms majority noted that, according to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile and that the hazard of accidental injury from passing traffic to an officer standing on the driver's side of a stopped vehicle may also be appreciable in some situations. Accordingly, under federal law, once a police officer has stopped a vehicle for a traffic violation he has the authority, without more, to order the driver out of the car.

In the dissent in Mimms written by Justice Stevens and in which Justices Brennan and Marshall joined, it is stated that "[t]he Court has based its legal ruling on a factual assumption

about police safety that is dubious at best [and]... has created an entirely new legal standard of justification for intrusions on the liberty of the citizen." 98 S Ct 337. Regarding the majority's reliance on one study's statistical finding that "approximately 30% of all police shootings occurred when the police officer approached a suspect seated in an automobile," 98 S Ct 333, Justice Stevens stated:

"That statement does not fairly characterize the study to which it refers. Moreover, the study does not indicate that police officers can minimize the risk of being shot by ordering drivers stopped for routine traffic violations out of their cars. The study reviewed 110 selected police shootings that occurred in 1959, 1960, and 1961.(7) In 35 of those cases, 'officers were attempting to investigate, control, or pursue suspects who were in automobiles.' (8) Within the group of 35 cases, there were examples of officers who 'were shot through the windshield or car body while their vehicle was moving'; examples in which 'the officer was shot while dismounting from his vehicle or while approaching the suspect[']s vehicle'; and, apparently, instances in which the officer was shot by a passenger in the vehicle. Bristow, [Police Officer Shootings -- A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963)], n. 7, at 93.

"In only 28 of the 35 cases was the location of the suspect who shot the officer verified. In 12 of those cases the suspect was seated behind the wheel of the car, but that figure seems to include cases in which the shooting occurred before the officer had an opportunity to order the suspect to get out. In nine cases the suspect was outside the car talking to the officer when the shooting occurred.

"These figures tell us very little about the risk associated with the routine traffic stop, (9) and they lend no support to the Court's assumption that ordering the routine traffic offender out of his car significantly enhances the officer's safety. Arguably, such an order could actually aggravate the officer's danger because the fear of a search might cause a serious offendor to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed. Whatever the reason, it is significant that some experts in this case of human behavior strongly recommend that the police officer 'never allow the violator to get out of the car. . .' (10)

"7. As the author pointed out, '[n]o attempt was made to obtain a random selection of these cases, as they were extremely hard to collect.' Bristow, Police Officer Shootings--A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963).

"8. Ibid. Since 35 is 32% of 110, presumably this is the basis for the '30%' figure used in the Court's statement. As the text indicates, however, not all of these cases involved police officers approaching a parked vehicle. Whether any of the incidents involved routine traffic offenses, such as driving with an expired license tag, is not indicated in the study.

"9. Over the past 10 years, more than 1,000 police officers have been murdered. FBI, Uniform Crime Reports 289 (1977). Approximately 10% of those killings, or about 11 each year, occurred during 'traffic pursuits and stops,' but it is not clear how many of those pursuits and stops involved offenses such as reckless or high-speed driving, rather than offenses such as driving on an expired license, or how often the shootings could have been avoided by ordering the driver to dismount.

"10. '2. Never allow the violator to get out of the car and stand to its left. If he does get out, which should be avoided, walk him to the rear and right side of the car. Quite obviously this is a much safer area to conduct a conversation.' V. Folley, Police Patrol Techniques and Tactics 95 (1973) (emphasis in original).

"Another authority is even more explicit:

"The officer should stand slightly to the rear of the front door and doorpost. This will prevent the violator from suddenly opening the door and striking the officer. In order to thoroughly protect himself as much as possible, the officer should reach with his weak hand and push the lock button down if the window is open. This will give an indication to the driver that he is to remain inside the vehicle. It will also force the driver to turn his head to talk with the officer.

"The officer should advise the violator why he was stopped and then explain what action the officer intends to take, whether it is a verbal or written warning, or a written citation. If the suspect attempts to exit his vehicle, the officer should push the door closed, lock it, if possible, and tell the driver to 'please stay in the car!' Then he should request [the] identification he desires and request the violator to hand the material out of the window away from the vehicle. The officer should not stare at the identification but [should] return to his vehicle by backing away from the suspect car. As the patrolman backs away, he should keep his eyes on the occupant(s).

"The officer should remain outside of the patrol unit to use the radio or to write a ticket. The recommended position for him at this time would be to the right side of the patrol unit. Should the driver of the violator vehicle make exit from his seat, the officer should direct the violator to the rear center of his vehicle or the front center area of the patrol unit. Preferably, the officer should verbally attempt to get the violator to re-enter and remain in the vehicle." A Yount, Vehicle Stops Manual, Misdemeanor and Felony 2-3 (1976).

"Conflicting advice is found in an earlier work, G. Payton, Patrol Procedure 298 (4th ed. 1971). It is worth noting that these authorities suggest that any danger to the officer from passing traffic may be greatly reduced by the simple and unintrusive expedient of parking the police car behind, and two or three feet to the left of, the offender's vehicle. Folley, supra, at 93; Payton, supra, at 301; Yount, supra at 2." 98 S Ct 337-338.

The dissent by Justice Stevens also notes that a state is free to provide its citizens with greater protection in this matter than that afforded under the Fourth Amendment of the United States Constitution. 98 S Ct 336. It is well established that state constitutions can provide greater protections than those afforded by the federal constitution. People v Thompson, 424 Mich 118, 125; 379 NW2d 49 (1985).

We agree with the dissent of Justice Stevens in Mimms and therefore hold that a police officer, after stopping an automobile for a traffic violation, may not order the driver to exit the car, and thus protract the detention, unless the test announced in Terry has been fulfilled, i.e., unless the officer

had a reasonable, articulable suspicion that the driver committed, or was about to commit, a crime. Maintaining the Terry standard in situations involving traffic stops by police officers will help to ensure that the right to be free from unreasonable seizures will not wholly be eroded in traffic offense cases and, as a corollary, that citizens will not lawfully be vulnerable to unnecessary, intrusive and intimidating police commands. As observed by Justice Stevens, the risk to a police officer in the context of a legitimate traffic stop cannot be so universal as always to constitute a reasonable justification for ordering a citizen out of his car.

> "The commuter on his way home to dinner, the parent driving children to school, the tourist circling the Capitol, or the family on a Sunday afternoon outing hardly pose the same threat as a driver curbed after a high-speed chase through a high-crime area late at night. Nor is it universally true that the driver's interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority. Whether viewed from the standpoint of the officer's interest in his own safety, or of the citizen's interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of traffic stops that occur every year are not fungible." 98 S Ct 338.

In addition, maintaining the Terry standard in this context will help to avoid the arbitrary exercise of the power to force a citizen out of his car in those many, many circumstances in which there exist no suspicions for fearing the driver but, for instance, because of the political message of a bumper sticker on the car or the color of the driver's skin, the driver is nevertheless legally obliged to obey submissively the instruction of a police officer. The line between unfettered discretion and discrimination is a fine one indeed.

We are aware that the majority decision in Mimms has been cited by this Court with apparent approbation. In People v Laube, 154 Mich App 400, 408-410; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987), for example, a panel of this Court, citing Mimms, rejected an argument by the defendant that a stop for the civil infraction of walking on the shoulder of a road with, and

not against, traffic, MCL 257.655, MSA 9.2355, did not authorize the stopping deputies to extend his detention or conduct a frisk. In Laube, however, the defendant himself "consented to, and indeed, appears to have initiated, an extended contact with the officers," and "repeatedly placed his hands in his pockets while inching towards the rear of the patrol car." 154 Mich App 410. These circumstances created a legitimate concern on behalf of the officers regarding their safety. Moreover, in People v Blackburne, 150 Mich App 156, 164-165; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986), a panel of this Court, citing Mimms, found that the detaining, and pat-down searches, of the defendant and three other men were not unreasonable after the driver of the car in which the men were travelling committed a traffic violation by driving on the wrong side of the center line for a distance of about 1/8th of a mile. In Blackburne, however the police had reasonable, articulable suspicions that criminal activity was afoot even before stopping the car for the traffic violation. Before stopping the car and subjecting its driver and passengers to detainment, "[t]he police officers reasonably suspected that the four men in the car were engaged in drug shipment activity." 150 Mich App 164. Thus, while both Laube and Blackburne cite Mimms, neither case, to support its result, relies exclusively on the holding in Mimms.

We find added support in People v Burrell, 417 Mich 439; 339 NW2d 403 (1983), for our conclusion that the Michigan constitutional provision regarding freedom from unreasonable searches and seizures, Const 1963, art 1, §11, affords more protection to individuals such as the present defendant than that provided under federal constitutional law. In Burrell, the defendant's vehicle was legitimately stopped by police for violation of a statute prohibiting excessively noisy exhaust systems, MCL 257.707; MSA 9.2407. This legitimate stop revealed that the driver had no driver's license or vehicle registration. Thus, the police reasonably suspected that the vehicle was stolen. The Supreme Court, stressing that the intrusiveness of

police activity must be carefully limited to the circumstances justifying the detention, found that the police were able to detain the defendants only so long as to write citations for the noisy exhaust system and -- after determining by way of a LEIN check that the driver was licensed and that the car was not reported as stolen -- the driver's failure to have in his possession a valid driver's license. The Court stated:

"Analytically, given this state of facts, it is clear that more than one roadside detention occurred. Initially, driver Brown was properly stopped for an equipment violation. A detention following a stop for such a minor violation would be justified only for the length of time necessary to write a citation. Here, however, the stop immediately revealed a new set of circumstances, a driver without either a operator's license or a vehicle registration. We agree that it was reasonable to suspect that the vehicle was stolen, and we also agree that detention was justified long enough to resolve the suspicion raised. When the LEIN check verified that Brown was licensed and that the car was not reported stolen, that suspicion expired. By 7:15 p.m., detention, again, could be justified only for the length of time required for Blackport to write a citation for Brown's failure to have a valid driver's license in his possession while driving."

Although this statement concerns only the duration of a detention, it is clearly implied that the manner of a detention should be no more intrusive than that necessary to address the issue or issues justifying the detention in the first place. In this regard, the Supreme Court made the following observations and statements:

"In [United States v] Brignoni-Ponce, [422 US 873, 881-882; 95 S Ct 2574; 45 L Ed 2d 607 (1975)], the United Supreme Court applied the Terry 'stop and frisk' doctrine to investigatory stops of automobiles by a roving border patrol. The Court condemned a random stop of a vehicle made because its three passengers appeared to be of Mexican descent. The Court concluded that appearance alone was an insufficient basis to allow a random stop and brief questioning. This result flowed naturally from the Terry requirement that more than 'inchoate and unparticularized suspicion or 'hunch'' was necessary to justify a frisk of a suspicious individual.

* * *

"In Delaware v Prouse, [440 US 648; 99 S Ct 1391; 59 L Ed 2d 660 (1979)], the Court required that a police officer who stops and detains a motorist to check for a valid driver's license and registration have at least an articulable and reasonable suspicion that the motorist is unlicensed or that the vehicle is not registered. The officer in the case testified that he had not observed traffic or equipment violations or any suspicious activity prior to making the stop. The Court ruled that his stop was unreasonable.

"In the instant case, we do not deal with any improper stop. Therefore, neither Brignoni-Ponce nor Delaware v Prouse is dispositive. However, since a stop almost inevitably leads to a brief detention for questioning, we draw guidance from these decisions as to the standard applicable to a brief detention on

an unrelated matter following an otherwise lawful stop. Proceeding from the premise that a brief detention is at least as intrusive for Fourth Amendment purposes as a stop, we conclude that a brief detention for questioning is permissible if based on a reasonable and articulable suspicion of criminal activity.

"Since fourth Amendment rights are involved in a detention, however brief, the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention." (Footnotes omitted; emphasis in original.) 417 Mich 455-457.

The evidence in the present case is clear that Officer Rix had no reasonable, articulable suspicion that defendant was engaged in criminal activity at the time he, presumably, was ordered out of his car. At that time, Officer Rix knew that defendant's car had frequently gone in and out of a motel parking lot during the early morning hours of May 12, 1986; that numerous stolen cars had been found in the parking lot in the past; that defendant had illegally run a red light in a high-crime area; and that defendant complied in a cooperative manner upon being requested to produce his driver's license and vehicle registration. We fail to see how any "specific reasonable inferences of criminal activity could possibly be drawn from these facts." Burrell, supra, p 458. Either taken singly or in toto, they suggest to us nothing particularly nefarious, illicit, improper or illegal. It is only after defendant got out of his car that questions of safety arose, i.e., it was only after defendant got out of his car that defendant began acting nervously, displayed a bulge in a coat pocket, and produced a gun, for which he possessed a facially valid general permit and safety inspection certificate. This latter evidence, however, was discovered only after the police escalated defendant's detention from that of a mere traffic citation incident to something more. Applicable here is the Burrell Court's observation that, "rather than having a crime and looking for the criminal[], the police, here, had the 'criminal[]' and were looking for the crime." 417 Mich 459. While the results of such police activity may -- and in this case, were -- very efficacious, such ends, in a constitutional matter as that now in issue, cannot justify the means employed. As also noted by the

Supreme Court in Burrell, it is of course painful to suppress otherwise good and highly incriminating evidence that led to a defendant's conviction, but the loss of that evidence "is balanced by the fact that it is only in difficult situations such as those presented here that we can draw the fine lines between the authority of the police to protect us from crime and the use by the police of governmental power to violate our constitutional rights." Id.

Accordingly, having reviewed the entire record in this case, we are firmly convinced that the trial court erred in denying defendant's pretrial motion to suppress the narcotics evidence used against him at trial because we are unable to find specific facts which would support a reasonable suspicion of criminal activity sufficient to justify ordering defendant out of his car after being stopped for a simple traffic violation. Since the incriminating evidence in this case was the fruit of an illegal detention effected by the police, it should have been suppressed. Wong Sun, supra; Shabaz, supra.

In light of our decision to reverse defendant's convictions on the basis of his illegal detention, the other issues he raises on appeal need not be addressed. Burrell, supra, p 460, n 30.

Reversed.

/s/ Myron H. Wahls
/s/ Harold Hood

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 101536

RONALD ALLEN HARMELIN,

Defendant-Appellant.

Before: Wahls, P.J., and Hood and N.J. Kaufman,* JJ.

N.J. KAUFMAN, J. (dissenting)

I vigorously disagree with the majority's hinging review of this case on the assumption that Officers Rix and Blakeney ordered defendant out of his car. The record reflects that neither officer could recall whether defendant was ordered out of his car or whether defendant simply got out on his own initiative, and defendant did not testify.

Unlike the majority, I do not find it in the least unlikely that defendant would have exited his car without being told to do so. To the contrary, given the contraband contained in the trunk of defendant's car, I find it very understandable that defendant would get out and as far away from his car as he could. The majority's assumption concerning defendant's actions is justified by neither the record nor defendant's brief on appeal, the later of which is void of any reference to the theory adopted by the majority.

Clearly, defendant was lawfully stopped for running a red light, a civil infraction, MCL 257.611; MSA 9.2311. People v Burrell, 417 Mich 439, 450; 339 NW2d 403 (1983); People v Laube, 154 Mich App 400, 407; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987). The police officers, in conducting the pat-down search, must have concluded that defendant was armed and dangerous based on a specific, articulable, reasonable inference drawn from the facts for the frisk to have been a reasonable intrusion upon

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

defendant's Fourth Amendment rights. Terry v Ohio, 392 US 1, 32; 88 S Ct 1868; 20 L Ed 2d 889 (1968); Michigan v Summers, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981); People v Blackburne, 150 Mich App 156, 164; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986).

In this case, defendant volunteered the fact that he was carrying a gun, for which he had a general permit, in a holster strapped to his ankle. Seeing what he believed were several bulges in defendant's coat, Officer Rix suspected that defendant was carrying other undisclosed weapons on his person. This suspicion was enhanced by defendant's extremely nervous demeanor and their location in a high crime area, and Officer Rix became concerned for his own safety. Although these facts may not justify a pat-down search if considered separately, when considered together the pat-down search was a justifiable intrusion upon defendant's Fourth Amendment rights. The purpose of the pat-down search was not to discover evidence of a crime, but to protect the officers from harm by seizing suspected weapon or weapons. Terry, 392 US 23; Adams v Williams, 407 US 143, 146; 92 S Ct 1921, 1923; 32 L Ed 2d 612, 617 (1972); Pennsylvania v Mimms, 434 US 106, 110; 98 S Ct 330, 333; 54 L Ed 2d 331, 336-337 (1977); and Ybarra v Illinois, 444 US 85, 93; 100 S Ct 338, 343; 62 L Ed 2d 238, 247 (1979).

There is no need to strain for reversal by following the dissent in Mimms, as the majority in this case has done, because the Terry test was met: the officers had a reasonable, articulable suspicion that defendant was armed and a danger to their safety.

Nor do any of defendant's four other claims on appeal require reversal.

First, defendant argues that his right not to be compelled to testify against himself was violated when Officer Rix asked him about the hard object felt in defendant's chest

pocket. This conversation took place prior to defendant's arrest. Officer Rix believed the hard object was another gun, and asked defendant what it was. Defendant replied that it was his marijuana. The limited constraint conferred upon defendant's freedom by the officers conducting the pat-down search does not rise to the level of a custodial interrogation, and precludes a finding that defendant's admission was compelled by police action. People v Hill, 429 Mich 382, 397; 415 NW2d 193 (1987).

Second, the warrantless search of defendant's car was not an unjustifiable intrusion upon defendant's Fourth Amendment rights such that the fruits of this search should have been suppressed. Defendant's car was properly impounded under the forfeiture provisions on the Controlled Substance Act, MCL 333.7522; MSA 14.15(7522). However, because the officers' testimony established that the Oak Park Police Department's standardized procedure did not mandate searching and conducting an inventory of the contents of every container within the vehicle, the inventory search done in this case does not fall within the parameters of Colorado v Bertine, 479 US ___; 107 S Ct 738; 93 L Ed 2d 739 (1987); People v Krezen, 427 Mich 681; 397 NW2d 803 (1986).

I would find that the search in this case falls under the automobile exception to the warrant requirement enunciated in United States v Ross, 456 US 789; 102 S Ct 2157; 72 L Ed 2d 572 (1982), and adopted by this Court in People v Cruz, 161 Mich App 238, 241-242; 409 NW2d 797 (1987), lv den 430 Mich 854 (1988). Ten clear plastic bags filled with white powder, three small vials containing white powder, assorted pills and capsules, paraphernalia of the type used to ingest cocaine, and a telephone paging device were retrieved from defendant's person after his arrest, and a gun was strapped to defendant's ankle when the officers stopped him. These facts would lead a reasonably prudent person, thus police had a probable cause, to believe that

defendant's car contained more controlled substances. People v Goins, 164 Mich App 559, 560; 417 NW2d 499 (1987). Although the trial court's denial of the suppression motion was not based on the automobile exception to the warrant requirement, reversal is not mandated where the trial court reaches the right result for the wrong reasons. People v Beckley, 161 Mich App 120, 131; 409 NW2d 759 (1987), lv gtd on other grds 430 Mich 857 (1988).

Third, under either the Michigan or federal standard,[1] defendant's claims that he was deprived of the effective assistance of counsel and the right to plead not guilty because (1) his trial counsel offered no evidence in response to the prosecutor's case-in-chief, but solely confined the defense to attacking the admissibility of evidence found on defendant's person and in his car, and (2) counsel did not argue that defendant was not guilty of knowingly possessing the cocaine found in his trunk, are both without merit. The evidence against defendant was overwhelming, and counsel's strategy in concentrating the defense on the admissibility of the disputed evidence focused upon defendant's best and only chance of acquittal. This choice of strategy was not the functional equivalent of a guilty plea proscribed in People v Schulz, 85 Mich App 527; 271 NW2d 305 (1978), and defendant was afforded his constitutional right to plead not guilty. People v Fisher, 119 Mich App 445; 326 NW2d 537 (1982).

Defendant's last claim is that the mandatory sentence of life imprisonment is entirely out of proportion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by US Const, Am VIII, and Const 1963, art 1, § 16. I disagree. See People v Harding, 163 Mich App 298, 329; 413 NW2d 777 (1987), vacated on other grds 430 Mich 858-859 (1988).

I would affirm defendant's convictions and sentence.

/s/ Nathan J. Kaufman

[1] People v Garcia, 398 Mich 250; 247 NW2d 547 (1976), sets forth the Michigan standard; the federal standard is set forth in Strickland v Washington, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and was applied in People v Dalessandro, 165 Mich App 569, 574-575; 419 NW2d 609 (1988)

Court of Appeals, State of Michigan

ORDER

Myron H. Wahls
Presiding Judge

People v Ronald Allen Harmelin

Docket # 101536

L.C.# CR 86 73784 FH

Harold Hood
Nathan J. Kaufman
Judges

This Court having issued a judgment in this case on January 9, 1989, and precedent, uncited by the parties, affecting the analysis of an issue in that judgment having come to the attention of the Court,

IT IS ORDERED, on the Court's own motion, that the January 9, 1989, judgment is vacated, the decision to publish is reversed, and the case is retained for the issuance of a judgment on reconsideration.

/Harold Hood

A true copy entered and certified by Ronald L. Dzierbicki, Chief Clerk, on

March 9, 1989
Date

Chief Clerk

Court of Appeals, State of Michigan

ORDER

Myron H. Wahls
Presiding Judge

People v Ronald Allen Harmelin

Docket # 101536

L.C.# 86 73784

Harold Hood
Nathan J. Kaufman
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk, on

April 18, 1989
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD ALLEN HARMELIN,

Defendant-Appellant.

April 18, 1989

FOR PUBLICATION

No. 101536

(On Reconsideration)

Before: Wahls, P.J., Hood and N.J. Kaufman*, JJ.

PER CURIAM.

On March 9, 1989, this Court, on its own motion, vacated its judgment in this case issued on January 9, 1989, and retained the matter for reconsideration. Of concern was the effect of a constitutional provision and its case-law precedent, uncited by the parties, on the issue of the propriety of a police officer ordering a driver out of his car after having stopped the driver for a traffic violation. Two judges of this panel concluded that the Michigan Constitution's search-and-seizure provision provided greater protection to drivers in such a situation than that available under the analogous provision of the federal constitution. Under the latter, a police officer's order to a driver to exit his car after the car has been lawfully stopped for a traffic violation does not violate the Fourth Amendment even though the officer had no reason to suspect foul play at the time. Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). The third judge of this panel, writing in dissent, concluded that the record did not support the assumption that defendant was ordered out of his car by the police and, on the contrary, suggested that defendant had voluntarily gotten out of his car after having been lawfully stopped for a traffic violation.

On reconsideration, we hold that, even if defendant in this case were ordered out of his car by the police after having been legally stopped for a traffic violation, the narcotics evidence revealed after subsequent searches could not have been suppressed from evidence under the Michigan Constitution's search-and-seizure provision because, under the circumstances in this case, that provision affords defendant with no greater protection than that provided under the analogous federal provision in the Fourth Amendment. Regarding the remaining issues raised by defendant on appeal and not addressed in the January 9, 1989, majority opinion, we adopt the reasoning and conclusions set forth in the dissenting opinion of that date.

The facts in this case were recited in our earlier opinion:

> "Defendant, Ronald Allen Harmelin, was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2), and was sentenced on April 30, 1987, by the Oakland Circuit Court to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. On appeal, defendant argues that his convictions must be reversed because the evidence against him was obtained as a result of an unconstitutional seizure and pat-down search of his person and an unconstitutional search of his car; that his convictions must be reversed because he was deprived of the effective assistance of counsel; and that his sentence for the cocaine conviction must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constitutes cruel and unusual punishment....
>
> "The record reveals that in the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. Numerous stolen vehicles had been found in this lot in the past. At this time, the officers observed defendant's car exiting the parking lot, and although they were called away on other police business at various times that morning, they saw defendant's car entering the Embassy Motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of defendant's car, the officers noticed nothing unusual or illegal in the manner in which defendant's car was being driven.
>
> "Shortly after 5:00 a.m., while continuing to patrol the area around the Embassy Motel, Officers Rix and Blakeney saw defendant's car make a U-turn at the intersection of Eight Mile and Hubbell Roads, a high-crime area, without stopping for a red light. When the officers, in their patrol car with its overhead lights flashing, pulled behind defendant's vehicle, defendant responded by stopping in a reasonably prompt fashion. Officer Rix walked to the driver's side of defendant's car, while Officer Blakeney positioned himself at the passenger side of the car. Defendant, who remained seated in his car, complied in a cooperative manner upon being requested by Officer Rix to produce a driver's license and vehicle registration. Defendant then stepped out of his car. Neither of the officers could recall whether defendant was ordered out of his vehicle or whether he got out of it on his own initiative, although Officer Rix testified that if he did in fact order defendant out of the car, that order would have been prompted solely by the nervous behavior exhibited by defendant -- behavior described as defendant's having "trouble getting some of the words out." In any event, after exiting his car, defendant, in a nervous manner, informed Officer Rix that he was carrying a pistol concealed in an ankle holster. He explained that he had a permit for the weapon, however, and that he did not want the officers to become alarmed. He then handed Officer Rix a general permit to carry a concealed weapon as well as a safety inspection certificate for the .38 caliber, five-shot revolver, which was later found in his ankle holster.
>
> "After looking at the firearm documents proffered by defendant, Officer Rix observed nothing which suggested that the papers were possibly invalid. Nonetheless, because defendant appeared to be nervous, because he was armed, albeit legally, and because he had a bulge in one of his coat pockets, Officer Rix, fearing for his own safety and sensing that "[t]here was something wrong," decided to conduct a pat-down search of defendant. In doing so, some marijuana was discovered, and defendant was placed under arrest.
>
> "In searching defendant after his arrest, the officers found other incriminating evidence in defendant's possession, including assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper. Later, pursuant to the standard policy of the Oak Park Police Department, defendant's car was impounded for a possible forfeiture action, and an inventory search was conducted. During this search, a satchel containing a shaving-kit bag was discovered in the trunk. The kit contained $2900 in cash and two bags of white powder subsequently determined to be 672.5 grams of cocaine. A fingerprint expert testified that defendant's fingerprints were found on books located inside the satchel and next to the bags of cocaine.
>
> "Defendant neither testified in his own behalf nor presented any witnesses."

In our earlier opinion, we recognized that in Mimms, supra, a majority of the United States Supre Court held that a police officer's order to a driver to get out of his car after the car was lawfully stopped fo traffic violation did not violate the Fourth Amendment, even though the officer had no reason to suspect fo lay at the time, and that other panels of this Court have cited Mimms with approbation, People v Laube, 1

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*Retired Court of Appeals judge, sitting on the Court of Appeals by assignment.

Mich App 400, 408-410; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987); People v Blackburne, 150 Mi App 156, 164-165; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986). Nevertheless, we decided in o earlier opinion that, under the Michigan Constitution's search-and-seizure provision, a driver such defendant in the present case should be afforded more protection from the police than is afforded under t Fourth Amendment's prohibition against unreasonable searches and seizures. In doing so, we followed t dissent of Justice Stevens in Mimms, and thus declared that a police officer, after stopping an automobile for traffic violation, could not order the driver to get out of the car, and thus protract the driver's detention, unle the test announced in Terry v Ohio, 391 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), had been fulfilled, i.e unless the officer had a reasonable, articulable suspicion that the driver committed, or was about to commit, crime. We opined that maintaining the Terry standard in situations involving traffic stops by police officer would help to ensure that the right to be free from unreasonable seizures would not be wholly eroded i traffic offense cases and, as a corollary, that citizens would not lawfully be vulnerable to unnecessary intrusive, and intimidating police commands.

On reconsideration, we find that whether Justice Stevens, in his dissent in Mimms, had the bette argument on this issue is not controlling because in this case we are obliged to follow the majority decision ir Mimms. The search-and-seizure provision in the Michigan Constitution provides:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." (Emphasis added.) Const 1963, art 1, §11.

The language of this section itself specifies that the protections granted under the section shall not be construed to bar from evidence any narcotic drug seized by a police officer outside the curtilage of a house. In this case, since the evidence was seized from defendant by the police on the open highway, and therefore outside the curtilage of a house, the protections granted under the state's search-and-seizure provision are not available to defendant. Instead, defendant is entitled only to those protections available to him under the federal constitution. See People v Catania, 427 Mich 447, 466, n 12; 398 NW2d 343 (1986); People v Ragland, 149 Mich App 277, 281; 385 NW2d 772 (1986); People v Alfafara, 140 Mich App 551, 560-561; 364 NW2d 743 (1985). And, as already stated, under federal law, the police were entitled to order defendant out of his car after it was lawfully stopped for a traffic violation. Mimms, supra.

After defendant's automobile was lawfully stopped for a traffic violation and after defendant was awfully ordered out of his car, it is clear that a pat-down search of his person was warranted under the Terry standard, i.e., it was reasonable to conclude that criminal activity might have been afoot and that defendant might have been armed and dangerous. See People v Payton, 166 Mich App 428, 430-431; 421 NW2d 191 (1988); People v Peyton, 167 Mich App 230, 236-237; 421 NW2d 643 (1988). Defendant, in a high crime area during early morning hours, was admittedly carrying a pistol in an ankle holster, appeared to be extremely nervous, and had a bulge in one of his coat pockets which led the arresting officer to believe that defendant could have been carrying a second concealed weapon. Fearing for his safety and for that of his partner, and believing that, "[i]f [defendant] had, in fact, guns in his pockets where the bulges were, they could have been used on me, and I wouldn't have had a chance to respond," the officer conducted a pat-down search on defendant.

In the present case, defendant, prior to trial, moved to suppress the narcotics evidence against him on the ground that the detention and pat-down search to which he was subjected violated his Fourth Amendment rights. It is well established that evidence derived from an illegal seizure must be suppressed as the "fruit of the poisonous tree." Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); People v Shabaz, 424 Mich 42, 65; 378 NW2d 451 (1985), cert dis 478 US 1017; 106 S Ct 3326; 92 L Ed 2d 733 (1986). The trial court denied defendant's pretrial suppression motion. This Court will not disturb trial court's ruling on a suppression motion unless that ruling is clearly erroneous. Payton, supra, p 430; Peyton, supra, p 235; People v Burrell, 417 Mich 439, 448; 339 NW2d 403 (1983). We will find such a ruling

clearly erroneous if firmly convinced that a mistake has been made. People v Daniels, 160 Mich App 61 617; 408 NW2d 398 (1987). We discern no reason to disturb the trial court's ruling in this case.

Regarding the remaining issues raised on appeal by defendant, we agree with the reasoning a conclusions set forth in the dissenting opinion filed with our January 9, 1989, decision. We will review we briefly each of those issues.

First, defendant argues that his right not to be compelled to testify against himself was violated wh Officer Rix asked him about the hard object felt in defendant's chest pocket. This conversation took pla prior to defendant's arrest. Officer Rix believed that the hard object was another gun and asked defend what it was. Defendant replied that it was marijuana. The limited constraint placed upon defendant's freed by the officer conducting the pat-down search does not rise to the level of a custodial interrogation precludes a finding that defendant's admission was compelled by police action. People v Hill, 429 Mich 3 397; 415 NW2d 193 (1987).

Second, the warrantless search of defendant's car was not an unjustifiable intrusion upon his Fou Amendment rights such that the fruits of this search should have been suppressed. Defendant's car properly impounded under the forfeiture provisions of the Controlled Substances Act, MCL 333.7522; MS 14.15(7522). However, because the officers' testimony in the present case established that the Oak Pa Police Department's standardized procedures did not mandate searching and conducting an inventory of contents of every container within an impounded vehicle such as defendant's, the inventory search done in t case does not fall within the parameters of Colorado v Bertine, 479 US ___; 107 S Ct 738; 93 L Ed 2d 7 (1987); People v Kreczen, 427 Mich 681; 397 NW2d 803 (1986).

Nevertheless, we find that the search in this case falls within the automobile exception to the warra equirement enunciated in United States v Ross, 456 US 789; 102 S Ct 2157; 72 L Ed 2d 572 (1982), a dopted by this Court in People v Cruz, 161 Mich App 238, 241-242; 409 NW2d 797 (1987), lv den 430 Mi 54 (1988). Ten clear plastic bags filled with white powder, three small vials containing white powd assorted pills and capsules, paraphernalia of the type used to facilitate the ingestion of cocaine, and elephone paging device were retrieved from defendant's person after his arrest. Moreover, a gun w trapped to defendant's ankle when he was stopped by the officers. These facts establish probable cause elieve that defendant's car contained more controlled substances. Probable cause exists when the facts a reumstances warrant a person of reasonable prudence to believe that the evidence of a crime or contraba ought is in a stated place. People v Goins, 164 Mich App 559, 560; 417 NW2d 499 (1987). Although t ial court's denial of the suppression motion was not based on the automobile exception to the warra equirement, reversal is not mandated where the trial court reaches the right result for the wrong reas eople v Beckley, 161 Mich App 120, 131; 409 NW2d 759 (1987), lv gtd on other grds 430 Mich 857 (1988).

Third, under either the Michigan or federal standard,[1] defendant's claims that he was deprived of t ffective assistance of counsel and the right to plead not guilty because (1) his trial counsel offered idence in response to the prosecutor's case-in-chief, but solely confined the defense to attacking t missibility of evidence found on defendant's person and in his car, and (2) counsel did not argue th fendant was not guilty of knowingly possessing the cocaine found in his trunk, are both without merit. T idence against defendant was overwhelming, and counsel's strategy in concentrating the defense on t missibility of the disputed evidence focused upon defendant's best and only chance of acquittal. This choi strategy was not the functional equivalent of a guilty plea, and defendant was afforded his constitution ht to plead not guilty. People v Schulz, 85 Mich App 527; 271 NW2d 305 (1978); People v Fisher, 1 ch App 445; 326 NW2d 537 (1982).

Defendant's last claim is that the mandatory sentence of life imprisonment is entirely out portion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by US

Const, Am VIII, and Const 1963, art 1, § 16. We disagree. See People v Harding, 163 Mich App 298, 329; 413 NW2d 777 (1987), vacated on other grounds 430 Mich 859 (1988).

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Nathan J. Kaufman

[1] People v Garcia, 398 Mich 250; 247 NW2d 547 (1976), sets forth the long-accepted Michigan standard; the federal standard is set forth in Strickland v Washington, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and was applied in People v Dalessandro, 165 Mich App 569, 574-575; 419 NW2d 609 (1988), to a claim brought under the Michigan Constitution.

Order

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley, Chief Justice
Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices

Entered: January 29, 1990

863744(45)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD HARMELIN,

Defendant-Appellant.

SC: 86374
COA: 101536
LC: 86-73784-FH

On order of the Court, the delayed application for leave to appeal and the motion for remand are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

30123

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 29, 1990 Corbin R. Davis
Clerk

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v-

RONALD HARMELIN,

Defendant.

Case No. 101536

L.C. No. 86-73784-FH

AFFIDAVIT OF RONALD HARMELIN

Ronald Harmelin, being first duly sworn, does say and depose as follows:

1. I was the Defendant in the above captioned case.

2. I was in custody the entire time since my arrest.

3. My attorney, Curtis Rundell, never visited me at the jail. He did accept a couple of calls from me, but I could not talk freely because of the lack of privacy. Mr. Rundell refused my repeated requests that he visit me at the jail to discuss the case.

4. At no time did I ever tell attorney Rundell that I was guilty of the crime charged.

Ronald Harmelin
RONALD HARMELIN

Subscribed and sworn to before me this date: 1-5-88

LINDA C. NELSON
Notary Public, Wayne County, MI
My Commission Expires Jan. 22, 1991

Linda C. Nelson
Notary Public, Wayne County, Michigan

My commission expires 1-22-91

DETROIT FREE PRESS/SATURDAY, APRIL 29, 1989 5A

STATE

Judge rejects life sentence in drug case

BY JOE SWICKARD
Free Press Staff Writer

A Detroit Recorder's Court judge, in a ruling Friday, found the state's mandatory sentence of life in prison without parole in major drug possession cases to be unconstitutional because it is cruel and unusual punishment.

Judge Vera Massey Jones said it was improper to equate the drug offense with first-degree murder, one of the few offenses to carry the state's most severe sentence.

The penalty question arose in the case of Dwight Rashad, convicted April 20 of possession of 19 pounds of cocaine. Jones said she would sentence Rashad on May 5.

Assistant Prosecutor James Metz said Jones' ruling will be appealed and predicted the life sentence would be upheld.

"It is necessary to combat this cancer that is spreading through every community," Metz said, referring to drug abuse.

But defense lawyer Milton Henry said the state's drug laws are unrealistic and that he welcomes the prosecutor's appeal.

"The law speaks about possession of more than 650 grams of a powder containing cocaine — it doesn't even set a standard for what percentage of the powder is the drug," Henry said. "No matter how you balance it, it's cruel and unusual punishment...

ORIGINAL

Supreme Court, U.S.
FILED
MAY 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RONALD HARMELIN,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MICHIGAN

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

By: MICHAEL J. MODELSKI
CHIEF, APPELLATE DIVISION

PAUL J. FISCHER
Assistant Prosecuting Attorney
Counsel of Record

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US CONST, AMEND VIII 11

COUNTER-STATEMENT OF THE CASE

The instant petition arises out of a criminal case heard in the Sixth Circuit Court for the Count of Oakland. In that case, the Defendant-Petitioner Ronald Harme in was charged with the offenses of Possession Of Over 650 Grams O Cocaine [MCL 333.7403(2)(i); MSA 14.15(7403)(2)(i)], and Felony-Firearm [MCL 750.227b; MSA 28.424(2)]. The People alleged that those offenses were committed on May 12, 1986 in Oak Park, Michigan. Prior to trial, the Defendant brought a motion to suppress and an evidentiary hearing was conducted beginning on November 12, 1986.

First to testify at that hearing was Officer Calvin Rix of the Oak Park Public Safety Department and a 17-year police veteran. (T 11/12/86, 8) On May 12, 1986 at 2:45 a.m., Officer Rix was on patrol with his partner, Officer Blakeney, in the parking lot of the Embassy Motel in Oak Park. (T 11/12/86, 8) The officers were there checking vehicle VIN numbers and looking for stolen cars. (T 11/12/86, 8) At that time, Officer Rix testified that he observed a 1977 blue Ford LTD exit the parking lot and he again observed the car at 4:00 a.m. and at 5:00 a.m. (T 11/12/86, 9-10) On the third occasion, the car ran a red light at the intersection of Hubbell and Eight Mile Road. (T 11/12/86, 10) Officer Rix pursued the car, effected a traffic stop and observed that the Defendant was the driver and sole occupant. (T 11/12/86, 11)

The witness requested the Defendant's registration, driver's license and proof of insurance and those were produced. (T 11/12/86, 11) The Defendant exited his vehicle and began

walking back toward the patrol car when he volunteered information to the effect that he had a pistol in an ankle holster and that he had a CCW permit for the gun. (T 11/12/86, 11, 32) Officer Rix also observed several bulges in the Defendant's coat and became concerned for his own safety, suspecting that the Defendant might have more weapons on his person. (T 11/12/86, 12) He informed Officer Blakeney of the gun and they conducted a pat-down of the Defendant. (T 11/12/86, 12, 40-41) The Defendant was not under arrest at the time and the gun in the ankle holster was not immediately seized. (T 11/12/86, 33, 38)

Officer Blakeney felt a hard object in the Defendant's coat and inquired as to what it was. The Defendant replied that it was his marijuana. (T 11/12/86, 13) The object was removed and it was observed to be a cigarette case containing marijuana cigarettes. (T 11/12/86, 13) The Defendant was then placed under arrest for marijuana possession and he was searched pursuant to the arrest. (T 11/12/86, 13) A pouch was found in another coat pocket which contained Percodan pills, three vials of white powder and drug paraphernalia. (T 11/12/86, 14) An envelope containing ten small baggies of white powder and a beeper were also found on the Defendant's person. (T 11/12/86, 14, 52-54)

Following the Defendant's arrest, Officer Rix testified that the Defendant's car was impounded because it was in a traffic lane, it was a felony arrest, and because of possible action under the Forfeiture Act. (T 11/12/86, 14, 56) A short while later, an inventory search was conducted and a black satchel containing a shaving kit bag was found in the trunk. (T

11/12/86, 15, 63-65) The shaving kit bag contained two bags in which was a large amount of white powder subsequently shown to be cocaine. (T 11/12/86, 15, 73-75) After Officer Rix's testimony, the evidentiary hearing was adjourned to January 12, 1987. On that date, Officer Blakeney testified to being in the Embassy Motel parking lot looking for stolen cars and to observing the Defendant's car at 2:45 a.m., 4:00 a.m. and 5:00 a.m. (T 1/12/87, 5-7) He also described the traffic violation, the stop of the Defendant's car and the pat-down search after the Defendant exited from his car. (T 1/12/87, 7-8, 25-27) Officer Blakeney also noticed that the Defendant's pockets were bulging and that he appeared very nervous. (T 1/12/87, 9, 28-30)

As he patted the Defendant's coat, he felt a hard object and said, "What's this?" The Defendant replied, "That's my marijuana." (T 1/12/87, 9) The officer then pulled the object out and discovered that it was a cigarette case containing marijuana cigarettes. The pouch containing pills and vials of white powder was also found as well as the beeper and ten packets of white powder. (T 1/12/87, 10-11) Officer Blakeney also testified to the impoundment of the Defendant's car and the inventory search of the trunk which uncovered a large amount of cocaine and $2700.00 in cash. (T 1/12/87, 11-12, 37-40) At the conclusion of Officer Blakeney's testimony, and after argument by counsel for the respective parties, the court denied the Defendant's motion to suppress. (T 1/12/87, 60)

A bench trial was held in this matter on February 26, 1987. Prior to the submission of proofs, the parties stipulated

to the admission of 19 exhibits, including the gun and permit, the drugs, the various containers they were found in, the drug paraphernalia and the toxicology report. (T 2/26/87, 6-8) Officer Rix then testified in a manner consistent with his testimony at the evidentiary hearing as to why he was at the Embassy Motel (T 2/26/87, 27-29), his observations of the Defendant's car (T 2/26/87, 30-33), the traffic violation and the stop (T 2/26/87, 33) Defense counsel stipulated that the area in question was a high crime area. (T 2/26/87, 28) Officer Rix also testified as to the Defendant exiting his vehicle, volunteering the information about the gun, his nervous appearance and the bulges in his coat. (T 2/26/87, 34-36) The witness reiterated his earlier testimony concerning the pat-down, the discovery of the hard object, the Defendant's admission that it contained marijuana, and the subsequent discovery of other drugs, paraphernalia and the beeper on the Defendant's person. (T 2/26/87, 37-39) Finally, Officer Rix again described the impoundment and inventory search of the Defendant's car and the discovery of the cocaine and cash in the trunk. (T 2/26/87, 40-48)

On cross-examination, Rix testified that the pat-down search of Defendant was made out of fear for the officers' safety. Defendant admitted having a gun in an ankle holster and had bulges in his pockets. (T, 2/26/87, 84-85) According to Rix:

> A If he had, in fact, guns in his pockets where the bulges were, they could have been used on me, and I wouldn't have had a chance to respond.
> (T, 2/26/87, 85-86)

Defense counsel questioned what difference it made if Defendant had a number of guns on his person given that Defendant had a general concealed weapon permit. (T, 2/26/87, 75, 85):

> Q [Defense Counsel] Let me ask you something: If, in fact, you patted him down and you turned up two more guns, so what? What would you have done then?
>
> * * *
>
> Q (By Mr. Rundell, continuing) So what? What then? Now you've got two more guns. So what?
> A I would have been safe.
> Q You would have had to give them back to him, wouldn't you?
> A Eventually, yes. I would have had them in my possession.
> Q Until you had to give them back to him?
> A That's correct, and they would have been unloaded when I gave them back.
> Q Well, then why didn't you go immediately for the gun that you knew he had and unload that one if you were concerned?
> A If you bend down when you're patting somebody down to take a gun that's supposedly in an ankle holster, which I could not see, you're down below that person. I'm going to get shot in the head. I'm not going to do that.
> Q Why didn't you ask him to show you the gun then that he had?
> A Do you want to put a gun in somebody's hand and let them shoot you?
> Q No. He could have shown you, could he not, simply by putting his foot up and pulling up his pant leg?
> A Then he has the ability to get it out.
> Q Did Mr. Harmelin in any way threaten you that night?
> A No, he did not.
> Q Did Mr. Harmelin in any way make any overt gesture toward you that you interpreted as being a threat towards your safety?
> A No, he did not.
> Q Did Mr. Harmelin say anything to you from which you concluded that he was threatening your safety?

A He told me he had a gun.
Q All right. But, as a matter of fact, couldn't you conclude from that that if he was going to hurt you, the last thing he would have told you was that he had a gun?

* * *

Q (By Mr. Rundell, continuing) If the man was going to try to pull a gun on you and shoot you, he'd want to surprise you, wouldn't he?
A I suppose, but it's hard to tell.
Q There's not much surprise when he tells you, "I've got a gun," is there?
A You don't know out there.
(T, 2/26/87, 87-89)

Prior to the conclusion of cross-examination of Officer Rix, Michigan State Police Trooper Diane DeWitt was called out of order to testify and she was qualified as an expert in the field of fingerprint analysis. (T 2/26/87, 92) She identified fingerprints from the Defendant which were found on books contained in the satchel in his car's trunk that were directly adjacent to the large bags of cocaine. (T 2/26/87, 96-99) Officer Blakeney also testified out of order and in a manner consistent with his testimony at the evidentiary hearing. He once again described the stop (T 2/26/87, 111-112), the pat-down of the Defendant (T 2/26/87, 112-113), the post-arrest search of the Defendant (T 2/26/87, 113-114) and the impoundment and inventory search of the Defendant's car. (T 2/26/87, 117-119) Cross-examination of Officer Rix was then concluded and the People rested. (T 2/26/87, 170) The Defendant presented no witnesses and also rested. In his closing argument, the prosecutor noted that the toxicology report reflected an amount of 672.5 grams of cocaine in the packages found in the Defendant's

satchel. (T 2/26/87, 173) The prosecutor also commented on the Defendant's address book which contained coded instructions apparently related to drug trafficking. (T 2/26/87, 175)

Following closing arguments and its findings of facts, the trial court found the Defendant guilty on both of the charged offenses. (T 2/26/87, 197) On April 30, 1987, the Defendant was sentenced to mandatory terms of two years and life imprisonment for his convictions. (T 4/30/87, 3-4)

Defendant appealed his convictions as of right. The People accept the portion of Petitioner's Statement of the Case describing the appellate history of this case.

REASONS FOR DENYING THE WRIT

I. THE TRIAL COURT COMMITTED NO ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

In the trial court and on appeal, the Defendant has raised numerous challenges to the propriety of the various searches and seizures conducted by the police herein. To do so, the Defendant incorrectly attempts to frame the Fourth Amendment issues of this case within the framework of a "Terry" investigatory stop, see Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). He then initially argues that the pat-down search resulting in the discovery of drugs on his person was invalid since the police officers could not have reasonably suspected that criminal activity was afoot.

The Defendant's reasoning in that regard is factually flawed from the outset since the stop in this matter was a valid traffic stop for the civil infraction of running a red light, MCL 257.611; MSA 9.2311. In light of their observations, Officer Rix and Blakeney were entirely justified in conducting the traffic stop herein. As such, the initial stop was not within the meaning of Terry, supra. See also People v Laube, 154 Mich App 400; 397 NW2d 325 (1986).

In further contrast to the Defendant's argument, the People submit that the pat-down search which followed the traffic stop was an entirely reasonable measure intended to protect the safety of the investigating officers under cases such as People v Grimmett, 97 Mich App 212; 293 NW2d 768 (1980). To justify such a pat-down, the officer in question must be able to point to particular facts from which he could reasonably conclude that a

person was armed and dangerous. People v Parham, 147 Mich App 358; 382 NW2d 786 (1985), Sibron v New York, 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968).

Once a police officer has legitimately stopped a person or vehicle for a civil infraction, a bulge in the person's pocket, his furtive behavior or other circumstances can permit the officer to reasonably suspect that the person is armed and dangerous, thereby justifying the limited intrusion of a pat-down search. People v Blackburne, 150 Mich App 156; 387 NW2d 850 (1986), Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). In particular, bulges in a person's pockets can justify further inquiry by a police officer following a traffic stop, People v Ingram, 412 Mich 200; 312 NW2d 652 (1981), and a police officer's experience is a consideration in determining whether he reasonably believed that a pat-down search was required as a safety measure. People v Lillis, 64 Mich App 64; 235 NW2d 65 (1975).

In the case at bar, Officers Rix and Blakeney had 17 years and 20 years experience respectively. They were located in a high-crime area at night and had observed the Defendant's car on three occasions in the early morning hours on the day in question. The Defendant appeared nervous and there were several bulges in his coat when he exited from his vehicle. He himself volunteered that he was armed with a pistol. In light of those circumstances, Officer Rix and Blakeney were entirely justified in conducting the pat-down search for their own protection. Contrary to the Defendant's position, his possession of a CCW

permit did not automatically mean that he was not a potentially dangerous person. His accessibility to a handgun in an ankle holster under a trouser leg may have been somewhat limited and obvious, but the bulges in his coat represented a clear, potential and imminent danger to which he had ready access if in fact the bulges were made by weapons. Under the circumstances, the officers' pat-down of the Defendant can only be regarded as a reasonable and prudent step intended solely for their protection.

The Defendant next contends that the inquiry and examination of the cigarette case containing marijuana which was discovered during the pat-down was improper. Apparently, the Defendant has misread the facts of this case when he argues that the discovery of, and inquiry concerning, the cigarette case was beyond the scope cf a pat-down for weapons. In that regard, Officer Blakeney testified as follows:

Q Ok, so then what did you do?
A I started to do a pat down.
Q Was there anything, if I can back up, unusual about his appearance?
A Well, his pockets in his coat were bulging. And he appeared to be a little bit nervous.
Q Ok, so then what did you do?
A I started to do a pat down first. I grabbed his coat, with my - right in the chest area here, with my right hand. And I grabbed a hard object; my thumb on the bottom and my finger on top.
Q Where was this on the Defendant?
A Right here in the bosom area.
Q Ok, you're indicating his right chest area, correct?
A Yes, sir.
Q All right. You say you felt a hard object?
A Yes, sir, I did.
Q Ok, then what happened?
A I held onto it --
Q Why is that?
A Because I thought it was a gun.

Q Ok.
A And I asked him, I said, "What's this?" And he said, "That's my marijuana."
Q Ok, then what happened?
A He was - we took the - I reached into his pocket, and I pulled out a brass cigarette case, along with a black pouch.
Q Now, what area? Is this the area where you felt the hard object?
A Right, same hard object. I reached in, and pulled out, yes.
Q So you reached in, and what did you --
A I reached around inside his coat, and pulled it out. I grabbed what was in the pocket; it was a black pouch, along with the cigarette case.
Q Ok, so was that all in one action?
A Yes, it was.
Q Ok. Then when you pulled the objects out of his pocket, then what happened?
A Ok, I opened the cigarette case, and there was what appeared to be marijuana cigarettes. I advised him he was under arrest for possession of marijuana.

(T 1/12/87, 8-10)

At the time that the pat-down was initiated, the Defendant was not under arrest, nor was he the focus of a criminal investigation. As such, he was not entitled to Miranda[1] warnings, nor was there any violation of his Fourth Amendment rights. Rather than simply indicate that the object was a cigarette case, the Defendant volunteered that it was his marijuana. Only after that admission did Officer Blakeney remove the object from the Defendant's clothing and view its contents. Under the circumstances, there was absolutely no impropriety in the officer's actions.

The Defendant also challenges the legal validity of the impoundment of his vehicle. More specifically, he alleges that

---

Miranda V Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

the quantities and types of drugs found on his person were insufficient to provide cause to believe his vehicle was involved in a drug transaction and subject to forfeiture under MCL 333.7521(d); MSA 14.15(7521)(d). Again, however, the Defendant misreads the facts of this case. After his arrest for marijuana possession, the investigating officers discovered the pouch with three vials of suspected cocaine, percodan pills, amphetamines, and four separate implements for cocaine ingestion on his person. Additionally, the envelope with ten packets of suspected cocaine and a beeper were found in his pockets. The variety, amounts, and type of packaging of the drugs and paraphernalia found on the Defendant clearly gave rise to the reasonable inference that he was a drug dealer engaging in illegal drug transactions. Since his vehicle was a conveyance obviously used in furtherance of that activity, there is little doubt that it was properly subject to impoundment and forfeiture pursuant to the cited statute.

Finally, the Defendant attacks the legality of the inventory search of his vehicle and of the satchel discovered in the trunk. Clearly, however, an inventory search of a lawfully impounded vehicle is proper as long as it is conducted pursuant to a standard police department procedure. People v Long (On Remand), 419 Mich 636; 359 NW2d 194 (1984). In the instant case, Officer Rix testified that both the vehicle impoundment and the inventory search were conducted pursuant to established procedures. The inventory search of the trunk of a vehicle is also permissible when reasonably conducted to protect the police or public or to avoid claims against the police for allegedly lost

or stolen property. Cady v Dombrowski, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973), People v Hence, 110 Mich App 154; 312 NW2d 191 (1981). Under similar reasoning, the search of containers found in the truck of a vehicle during a valid inventory search is also permissible. South Dakota v Opperman, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976), Colorado v Bertine, 479 US 367; 107 S Ct 738; 93 L Ed 2d 739 (1987), People v Merchant, 86 Mich App 355; 272 NW2d 656 (1978).

Moreover, even if the search of the automobile did not fall within the inventory search exception, the Court of Appeals properly ruled that the search fell within the automobile exception to the warrant requirement because there was probable cause to believe that Defendant's car contained more controlled substances. People v Harmelin, 176 Mich App 524, 534 (1989).

A trial court's ruling on a motion to suppress should not be overturned unless clearly erroneous; that is, if the reviewing court is left with a definite and firm conviction that a mistake was made. People v Brown, 127 Mich App 436; 339 NW2d 38 (1983), People v Randle, 133 Mich App 335; 350 NW2d 253 (1984), People v Kerschner, 132 Mich App 623; 348 NW2d 282 (1984). The People submit that in light of the record of this case and the applicable law, no clear error or mistake was made by the trial court in denying the Defendant's motion to suppress.

II. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

With reference to the above argument, the Defendant alleges that his trial attorney was ineffective insofar as he couched the trial defense in terms of a legal attack on the validity of the searches herein as opposed to a factual attack on the evidence probative of the Defendant's guilt. Apparently, the Defendant believes that his attorney should have been more forceful in arguing his innocence based upon the facts. A review of the record herein as well as the applicable law shows that the Defendant's claim is factually and legally unsupported.

In People v Dalessandro, 165 Mich App 569, 573; 419 NW2d 609 (1988), the Court of Appeals adopted the federal standard for determining claims of ineffective assistance of counsel as follows:

> In Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the Supreme Court set forth the test to be used in reviewing claims of ineffective assistance of counsel. First, defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant under the Sixth Amendment. The objective standard of reasonableness must be used in determining whether defense counsel meets this threshold. Strickland, supra, pp 687-688. The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Id., p 689. Second, the deficiency must be prejudicial to the defendant. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Id., pp 691-692.

In every respect, the Defendant's claim fails to meet the above-cited test.

First, when viewed under the objective standard of reasonableness, there has been no showing of deficiency on the part of defense counsel since the choice of defense posture was clearly a matter of trial strategy. In light of the overwhelming evidence of guilt, defense counsel quite correctly realized that his client's only hope was to attack and prevent the admissibility of the inculpatory evidence on technical grounds. Matters of trial strategy will not give rise to a claim of ineffective assistance of counsel, People v Roberson, 90 Mich App 196; 282 NW2d 280 (1979), even where they seem erroneous with hindsight as long as they appeared sound to a competent, criminal attorney. People v Blue, 114 Mich App 137; 318 NW2d 498 (1982). In the present case, even with hindsight, defense counsel's trial strategy does not appear erroneous.

The Defendant also fails to show how defense counsel's alleged error was prejudicial. The Defendant suggests that trial counsel could have argued that the evidence failed to show knowledge and intent relative to possession of the drugs in the trunk of his car. Such an argument would have stretched counsel's credibility to the limit. It should be recalled that the cocaine was discovered in the Defendant's satchel located in his car. Objects with his fingerprints on them were discovered in close proximity to the narcotics. The Defendant possessed the same type of drug on his person in various containers. Given those facts, a defense based on ignorance of the existence of the drugs would have been patently unbelievable.

The Defendant incorrectly relies on cases such as Wiley v Sowders, 647 F2d 642 (CA 6, 1981) and People v Fisher, 119 Mich App 445; 326 NW2d 537 (1982). Those cases involved situations where defense counsel either stood mute and did nothing or consented to the equivalent of a guilty plea. A review of the record herein shows that defense counsel skillfully sought to guarantee his client's rights and to prevent the admission of evidence that was overwhelmingly probative of guilt. Effective assistance of counsel does not necessarily mean successful assistance of counsel. People v Higginbotham, 21 Mich App 489; 175 NW2d 557 (1970). The Defendant has totally failed to show that his trial attorney was in any way ineffective.

The Court of Appeals' conclusion should be affirmed, 176 Mich App at 535:

> The evidence against defendant was overwhelming, and counsel's strategy in concentrating the defense on the admissibility of the disputed evidence focused upon defendant's best and only chance of acquittal. This choice of strategy was not the functional equivalent of a guilty plea, and defendant was afforded his constitutional right to plead not guilty. People v Schulz, 85 Mich App 527; 271 NW2d 305 (1978); People v Fisher, 119 Mich App 445; 326 NW2d 537 (1982).

III. THE MANDATORY SENTENCE IMPOSED HEREIN DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The Defendant makes the largely emotional argument that the statutorily-mandated sentence of life imprisonment which was imposed following his conviction constituted cruel and unusual punishment because it has "thrown [him] into the pit of prison for all eternity." (Petitioner's Brief, p 23) In support of that argument, he makes the unusual but irrelevant points that he could have legally possessed over 650 grams of cocaine in Peru and that he could have legally possessed over 650 grams of cyanide in Michigan. The Defendant cites no legal authority in support of his position that is factually on point.

In very brief response to the Defendant's posture, the People note that on numerous occasions the Court of Appeals has rejected the argument that the mandatory life sentence for possession of 650 grams of cocaine is cruel or unusual. People v Harding, 163 Mich App 298; 413 NW2d 777 (1987), People v Ward, 133 Mich App 344, 357; 351 NW2d 208 (1984); People v Harman, 124 Mich App 93, 98; 333 NW2d 591 (1983), lv den 417 Mich 1100.45 (1983); People v Puertas, 122 Mich App 626, 630; 332 NW2d 399 (1983), lv den 417 Mich 1056 (1983); People v Kaigler, 116 Mich App 567, 572-573; 323 NW2d 486 (1982); People v Campbell, 115 Mich App 369, 376-381; 320 NW2d 381 (1982), lv den 417 Mich 879 (1983); People v McCarty, 113 Mich App 464; 317 NW2d 659 (1982), lv den 414 Mich 958 (1982).

The Sixth Circuit Court of Appeals in Young v Miller, 883 F2d 1276, 1282-1286 (CA 6, 1989) recently rejected an

argument similar to Defendant's involving the imposition of Michigan's mandatory life sentence for drugs upon a first offender. Although observing that "the tiger trap may have sprung upon a sick kitten," the Sixth Circuit found that the punishment was not cruel and unusual under US Const, Amend VIII. 883 F2d at 1285-1286. The Court in evaluating the gravity of drug offenses adopted the 5th Circuit's observation, 883 F2d at 1283:

> "Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image--others who create others still, across our land and down our generations, sparing not even the unborn." Terrebonne v Butler, 848 F.2d 500, 504 (5th Cir. 1988) (en banc), cert. denied, ____ US ____; 109 S.Ct. 1140; 103 LEd 2d 201 (1989).

While the Defendant portrays himself as an innocent and misguided individual with no prior record, it is clear that he possessed well over 650 grams of cocaine, some of which was individually packaged for apparent resale. He also possessed other types of narcotics, paraphernalia for drug use by himself and others, and a weapon. His possession of a beeper and the coded instructions in his address book would also seem to erode his contention that his crime was an isolated mistake in judgment. The People submit that the penalty imposed was proportionate to the offense and it did not constitute cruel and unusual punishment.

IV. DEFENDANT HAS FAILED TO SUPPORT HIS INFLAMMATORY CHARGE THAT THE COURT OF APPEALS WAS "INFLUENCED BY SOME SORT OF EX PARTE COMMUNICATION OR POLITICAL PRESSURE" AND THAT IT REVERSED ITSELF IN A SITUATION WHERE IT LACKED JURISDICTION.

Caught up in his rhetoric concerning the ready access of cocaine in Peru, the burning of witches in Salem and the legality of possessing cyanide (Petitioner's Brief, pp 21,22,24), Defendant charges that there was something improper about the Court of Appeals' decision to reverse its earlier ruling:

> The defense can only conclude that the court was influence [sic] by some sort of ex parte communication or political pressure.
> (Petitioner's Brief, 27)

The defense makes this accusation even though it is clear that the Court of Appeals in its first opinion failed to consider the limiting proviso found in the search and seizure provision of Michigan's Constitution. Const 1963, art 1, § 11.

Defendant has failed to offer any evidence whatsoever to support his claims of improprieties.

As it is, it is surprising that Defendant would rest his claims solely on a misunderstanding of Michigan appellate practice. Defendant misconstrues the teaching of People v George, 399 Mich 638 (1977) and other Michigan case law. MCR 7.302(F)(3) of the Michigan Court Rule of 1985 makes clear that jurisdiction over a case is vested in the Supreme Court only after leave to appeal is granted. If leave is denied, then jurisdiction would revest in the circuit court. At the time the prosecution's application was pending in the Michigan Supreme Court, jurisdiction was still with the Court of Appeals. The

timely application to the Supreme Court merely stayed the Court of Appeals decision as a final adjudication. People v Phillips, 416 Mich 63, 74 (1982).

Since jurisdiction was still with the Court of Appeals, it properly issued the order it did on March 9, 1989, [MCR 7.216(A)(7)] and its subsequent Opinion of April 18, 1989. At the time the prosecution filed its application for leave to appeal in the Supreme Court, a copy of the application was filed in the Court of Appeals pursuant to MCR 7.302(A)(3). It may be that the Court of Appeals reviewed this application and recognized its initial error. Defendant fails to make out any denial of due process.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Respondent prays that this Honorable Court issue an order denying Petitioner's petition for writ of certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

BY: _____
MICHAEL J. MODELSKI
Chief, Appellate Division

_____
PAUL J. FISCHER
Assistant Prosecuting Attorney
Counsel of Record

1200 North Telegraph Road
Pontiac, Michigan 48053
(313) 858-0686

DATED: May 3, 1990

Erasable Bond
25% COTTON FIBER

No. 89-7272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RONALD HARMELIN,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Dawn I. Johnston, being duly sworn, deposes and says that on the 3rd day of May, 1990, she sent a copy of Respondent's Brief In Opposition To Petition For Writ Of Certiorari To the Supreme Court Of The State Of Michigan, addressed to Ronald Harmelin, In Propria Persona, at #188131, Scott Regional Correctional Facility, Plymouth, Michigan 48170 by depositing same in an envelope with the Oakland County mailing pick-up service.

Further deponent saith not.

Dawn I Johnston

DAWN I. JOHNSTON, Deponent

Subscribed and sworn to before me,
this 3rd day of May, 1990.

Carol A. Theodorovich

CAROL A. THEODOROVICH, Notary Public
Oakland County, Michigan
My Commission Expires: 9/7/92

Supreme Court, U.S.
FILED
AUG 21
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7272

In The

Supreme Court of the United States

October Term, 1990

RONALD ALLEN HARMELIN,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ of Certiorari
To The Court of Appeals of Michigan

JOINT APPENDIX

CARLA J. JOHNSON
Appointed by this Court
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Counsel for Respondent

Petition for Writ of Certiorari filed April 2, 1990
Certiorari Granted May 29, 1990

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3/9/89 Order Vacating Opinion

4/18/89 Opinion on Reconsideration

1/29/90 Order Denying Leave to Appeal

OAKLAND COUNTY CIRCUIT
COURT, PONTIAC, MICHIGAN

Michigan

v.

Ronald Allen Harmelin

CR 86-73784FH

Complaint: 21703-86
File Class: 3500-5628

LABORATORY REPORT

Laboratory No	:	21703-86
Received By	:	John H. Siefert, Ph.D.
Delivered by	:	Det. Adam Jankowski
Complainant	:	Oak Park Dept. Public Safety 104549
Date Received	:	05-13-86
Time Received	:	12:35 P.M.
Nature of Exam	:	Bot. Chem.
Date Reported	:	05-13-86

Reference:

Violation of Public Health Coide [sic]

Suspect(s):

RONALD ALLEN HARMELIN W/M 02-22-45

Evidence Received:

#1 – Tag #32215

One clear plastic bag holding two sealed brown paper bags –

1a) containing a clear plastic bag holding 187.1 grams of white powder.

1b) containing a clear plastic bag holding a clear plastic bag containing 485.4 grams of white powder.

All of the packaging materials of Item #1 were turned over to Diane K. DeWitt 05-13-86 at 4:15 P.M.

#2 – Tag #32208

One sealed clear plastic bag holding –

2a) a sealed metal case containing 6 hand-rolled cigarettes

2b) a sealed manila coin envelope holding 10 sealed clear plastic bags

2c) 3 clear glass vials each containing a white powder

2d) a sealed clear plastic bag holding 12 yellow "DuPont Percodan" tablets

2e) a sealed clear plastic bag holding 25 two-tone green "BI 64" capsules

Results of Examination:

Examination of the powder of Items #1a and 1b showed it to be cocaine, a Schedule 2, Non-narcotic. No dilutents were detected. The total weight of powder contained in Items #1a and 1b was 672.5 grams.

Examination of one of the cigarettes of Item #2a showed that presence of marihuana, a Schedule 1, Non-narcotic.

Examination of 1the [sic] 0.14 gram of white power [sic] in one of the bags of Item #2b showed the presecne [sic] of cocaine, a Schedule 2, Non-narcotic.

Items #2c, 2d, and 2e were not examined.

/s/ John H. Siefert
John H. Siefert, Ph.D.
Laboratory Scientist

JHS:rk
5-14-86

MICHIGAN DEPARTMENT OF CORRECTIONS
PRESENTENCE INVESTIGATION REPORT

"PROBATION COPY" CFR-14

Honorable Gene Schnelz | County of Oakland | Sentence Date: 4-30-87

Docket CR 86-73784-FC | Attorney: C. Rundell | Appt. | Retained x

Defendant: HARMELIN, Ronald Allen | Age: 42 | D.O.B. 2-22-45

Charge(s)	Max.	Jail Credit	Bond	Proposal B
1. POSSESS CONTROLLED SUBSTANCE OVER 650 GRAMS - COCAINE	Life	353 days	N/F	yes
2. FELONY FIREARM	2 yr.mand.	353 days	N/F	yes

Convicted by: Plea Jury Judge x Plea Under Advisement Nolo Contendere HYTA PDI

Conviction Date: 2-27-87 Plea Agreement: Ct. III, Poss Controlled Substance U/50 Grams, and Ct. IV, Felonious Firearm, dismissed

Pending Charges: none

PRIOR RECORD

Convictions: Felonies: 0 Misdemeanors: 0 Juvenile Record: Yes No x
Probation: Active: Former: Pending Violation:
Parole: Active: Former: Pending Violation:
Current Michigan Prisoner: Yes No x Number:
Currently Under Sentence: no Offense: Sentence:

PERSONAL HISTORY

Education: 12th grade Employed: no Where:
Psychiatric History: Yes No x Physical Handicaps: Yes No x Marital Status: single
Substance Abuse History: Yes x No What: Percodan How Long: since '86

RECOMMENDATION

Incarceration.

Custody: 5-12-86 to 4-29-87.

Agent: Mary E. Asch Caseload No. 270 Date: 4-27-87
MEA/mac
Signature: _____ Supervisor's Approval: _____

EVALUATION AND PLAN

Ronald Allen Harmelin is a forty-two year old male who claims to be single. Born in Pennsylvania, he was raised in New Jersey, where he graduated from high school and subsequently entered the United States Air Force. He has resided in the Detroit area for the past eight years. He has no known legitimate employment, and claims he is a self-employed pool player and courier of gambling money. Defendant denied cocaine and heroin usage, however, admitted to the use of the controlled substance Percodan for approximately five months prior to his arrest in the instant offense.

The defendant has no previous criminal record. He was interviewed in the Oakland County Jail for this investigation, and denied, criminal culpability, claiming he thought he was transporting gambling money. He was unable to provide this writer with family members' addresses. He appeared to be guarded in disclosing information requested of him.

Police investigators described the defendant as a large-scale drug trafficker, delivering down to mid-level dealers.

In accordance with the mandatory statute associated with this conviction, incarceration is recommended.

MICHIGAN DEPARTMENT OF CORRECTIONS
BASIC INFORMATION REPORT

CFJ-101 2/86

IDENTIFICATION DATA

Mich. Prison No.	Court Name (Last, First, Middle) HARMELIN, Ronald Allen		
Mich. Probation No.	Real Name same		Last Known Address, Telephone 20481 Fleming, Det. 48234 #14
Place of Birth Philadeophia, Pa.	Country of Citizenship USA		48234

Date of Birth	Mich. Driver's License No.	Soc. Security No.	MSB No.	FBI No.
2-22-45	H654 744 051 138	136 38 3123	1376739	60733762

Local Police Agency & No.	Physical Problems	Marital Status	Dependents	Highest Grade
	☐ Yes ☒ No	single	0	12th

Race	Sex	Hair	Eyes	Height	Weight	Build	Complex.	Occupation
W	M	blk	bro	6'	190	med	olive	none

Scars, Marks, Tattoos	Health Insurance	Public Assistance	Assets over $1500
	☐ Yes ☒ No	☐ Yes ☒ No	☐ Yes ☒ No

Known Drug Use	Known Alcohol Abuse	Known Homosexual	Mental Health Treatment
☒ Yes ☐ No	☐ Yes ☒ No	☐ Yes ☒ No	☐ Yes ☒ No

Military Ser. No., Branch	From	To	Discharge Type	Religion
U.S.A.F.	'63	'67	Honoratle E-4	Agnostic

CRIMINAL HISTORY

Juvenile			Adult			
Comm.	Prob.	Escape	Jail	Prison	Prob.	Escape
0	0	0	0	0	0	0

Sex Offense Convictions: none

Pending Charges: ☐ Yes ☒ No

CURRENT STATUS

- 0 ☒ None
- 4 ☐ HYTA
- 4 ☐ Probation, circuit
- D ☐ Probation, district
- 3 ☐ Delayed Sentence
- 6 ☐ Parole
- 8 ☐ County Prisoner
- 8 ☐ State Prisoner

CURRENT OFFENSE DATA

NO. 1	NO. 2
Docket No. 86-73784-FC	Docket No. 86-73784-FC
Offense COCAINE POSS CONT. SUB. O/650 GR.	Offense FELONY FIREARM
Comp. Law No. 333.7403(1)	Comp. Law No. 750.227b
Max. Penalty Life	Max. Penalty 2 yr. consec.
Cir. Ct. No. 6th	Cir. Ct. No. 6th
Codefendants none	Codefendants none
Offense Date 5-12-86	Offense Date 5-12-86
Victim (name) N.E.T. (Relationship)	Victim (name) N.E.T. (Relationship)
Arrest Date 5-12-86	Arrest Date 5-12-86
Attorney C. Rundell Appointed Retained xx	Attorney C. Rundell Appointed Retained xx
Date of Bond N/F	Date of Bond N/F
CONVICTED BY: ☐ Plea ☐ Jury ☒ Bench ☐ Nolo Contendre ☐ HYTA ☐ Sec. 7411	CONVICTED BY: ☐ Plea ☐ Jury ☒ Bench ☐ Nolo Contendre ☐ HYTA ☐ Sec. 7411
Conviction Date 2-27-87	Conviction Date 2-27-87
Glty/Mental Ill. ☐ Yes ☒ No	Glty/Mental Ill. ☐ Yes ☒ No
Jail Credit Days 353	Jail Credit Days 353
Sentencing Judge Schnelz	Sentencing Judge Schnelz

Date Report Completed	County	Report Completed By	Caseload No.	Rec. Disp.
4-27-87	Oakland	Mary E. Asch	270	4

DISPOSITION

	TYPE OF SENTENCE (Prob., prison, HYTA delay Sec. 7411, F & C.)	SENTENCE DATE	TERMS OF SENTENCE: MINIMUM Yrs	MINIMUM Mos	MINIMUM Days	MAXIMUM Yrs	MAXIMUM Mos	FINE	COSTS	RESTIT.	COUNTY JAIL Mos	COUNTY JAIL Days
NO.1		4-30-87										
NO.2				3								

7

INVESTIGATOR'S DESCRIPTION OF THE OFFENSE:

The defendant is convicted of Count I, Possession Of Controlled Substance Over 650 Grams – Cocaine and Count II, Possession Of Firearm While Committing Felony. Two additional counts, Possession Of Controlled Substance – Cocaine Less Than Fifty Grams and Possession Of Firearm In Commission of Felony were dismissed.

This offense occurred on 5-12-86 in the vicinity of 8 Mile and Coolidge in Oak Park at approximately 5:10 a.m. On that date, police on routine patrol pulled defendant over per a routine traffic violation. Defendant, who was alone at the time, presented police with his I.D. in addition to a C.C.W. General Permit for the .38 five-shot revolver that he had on his person in an ankle holster. At this point, police observed bulges in the defendant's coat pocket and conducted a patdown of his person and discovered marijuana cigarettes, four brass cocaine straws, and one cocaine spoon, and three vials containing a white powder and suspected cocaine, twelve Percodan tablets, and twenty-five capsules later revealed to be Phendimetrazine Tartrate, a controlled substance; a Motorola beeper, and $597.78 in cash. At this point, the defendant was arrested and taken into custody.

The defendant's 1977 Ford LTD vehicle was impounded and during a police inventory of such, found in the trunk was a valise containing 672.5 grams of cocaine. Lab analysis of such revealed no dilutants detected. Also found in the valise with the cocaine was $2,900 in cash and an address book, as well as a number of personal toiletries. Police conducted a lab check of various items found in

the valise and linked such to the defendant per fingerprints.

The defendant has been held in custody since the arrest date in lieu of $500,000 bond.

According to investigators involved in this case, on the night of the instant offense, the defendant had booked a room at the Embassy Hotel in Oak Park, an area known for a high rate of drug trafficking and auto theft. The defendant is a Detroit resident, residing in the 8 Mile and Dequindre area. The defendant was also registered for a room at the Sagamore Motel in Royal Oak, since 4-18-86. Police investigation at the time of the instant offense found a seventeen year old female in the room.

Det. Jankowski of the Oak Park Police Department indicated that although the defendant has never held a viable employment and described himself as a self-employed courier, receiving and delivering, he applied and was granted a General C.C.W. Permit in Wayne County.

N.E.T. Investigators and Oak Park Police described the defendant as a large-scale drug dealer, delivering down to mid-level dealers. N.E.T. Investigators indicate that the street price of the cocaine confiscated in the instant offense from defendant is between $67,000 and $100,000.

VICTIM IMPACT:

The cocaine, defendant's jewelry and possessions, as well as $3,497.78 in cash, was confiscated by police under the Forfeiture Act.

OFFENDER'S DESCRIPTION OF THE OFFENSE:

"I was stopped for Moving Violation. At that time, I was subject to, in my opinion, an illegal search after I showed Officer that I had a gun license & gun permit. Upon search of my car, Officer searched my person (reaching hands into my pockets). He came out with coin envelope which contained some packets of cocaine & place me under arrest. The rest happened at police station where they claimed to find 670 grams of cocaine in suitcase (closed), inside of shaving kit (closed), inside of paper bag (folded up). The suitcase (over-night bag) was located inside trunk of my car."

PREVIOUS CRIMINAL RECORD:

Juvenile	None known; overage for check.
Adult	Per Michigan State Police, Detroit Police Department, and F.B.I.:
5-12-86	Oak Park P.D.; Ct. I, Possession Of Controlled Substance – Cocaine Over 650 Grams/Ct. II, Felony Firearm/Ct. III, Possession Of Controlled Substance Less Than 50 Grams/Ct. IV, Felony Firearm. Convicted of Counts I and II, and Counts III and IV dismissed. Instant offense.

MARRIAGE & FAMILY:

Mother	Shirley Mae McDonald nee Friedland. Defendant claims he does not know where his mother lives. He did claim she formerly resided on South Reed in Runnymead, New Jersey for approximately 10 years until 1984.

Father — Morton Harmelin; died in 1965 at age 64 of heart attack in Pennsaulkin, New Jersey. He had formerly been employed as a sales rep for a beauty supply firm.

Brother — Paul J. Harmelin, age 46; resides at unknown address, per defendant, in New Jersey. High school principal. Graduate of Philadelphia College Museum of Art.

Sister — Susan B. Harmelin, age 32; whereabouts unknown. Defendant claims she resides with his mother. Formerly secretary in Atlantic City.

Defendant is the second of three children born to his parents' union and raised in Philadelphia, Pennsylvania until the age of six, at which time he claimed the family relocated to South Jersey, Hadden Heights, and subsequently Sommerdale, New Jersey in Camden County. The defendant graduated in June of 1983 from Sterling High School in Sommerdale, ranking 92 out of 133. At this time, his family resided at 8 Glouster, Sommerdale, New Jersey. After graduating, defendant entered the U.S. Air Force and claims he was stationed in Washington, D.C. at Bolling A.F.B., where he was an Honor Guard. In 1967, he claims he was Honorably Discharged, Rank E-4, from the Air Force. Defendant claims to be single and denied paternity of children. He indicated he relocated to Detroit approximately eight years ago. At the time of the instant offense, he claims he was residing alone in an apartment at 20481 Flemming, Apt. 14, Detroit.

EMPLOYMENT & ECONOMIC STATUS:

Defendant has no known legitimate employment. He claims he is self-employed as a courier, delivering gambling money. He then classified himself as a pool player and indicated that he relocated to Detroit to pool-hustle. He claims he earns $500 to $800 a week cash playing pool. The defendant does not file income tax. It should be noted defendant was granted a General C.C.W. Gun Permit in Wayne County in January of 1986, claiming he needed such for business, as he was a courier.

Defendant claims no assets or liabilities. He has retained his attorney for $15,000, who has been paid in full by an associate of the defendant's, Ed White, according to police investigation.

Upon arrest in the instant offense, police confiscated from defendant $597.78 cash which was on his person and $2,900 in cash which was in the overnight bag in the truck of his vehicle, where the drugs were found. Also confiscated was defendant's 1977 LTD Ford, a Taurus .38 special revolver with ammunition and ankle holster, two gold chains which defendant was wearing value $100, one cloverleaf pendant and one eagle pendant valued at $100, one gold bracelet valued at $100, one gold cigarette lighter valued at $50, one Motorola beeper valued at $100, all on defendant's person.

SUBSTANCE ABUSE:

Defendant claims he has never used narcotic drugs other than Percodan, which he claims he began using in 2-1986 until his arrest in the instant offense, 5-1986. He claims he

was using seven Percodan tablets per day, had no prescription for such, and used due to a toothache and his fear of dentists. He claims he suffered withdrawal symptoms when incarcerated in the instant offense. He also acknowledged use of marijuana. The defendant denied drug trafficking; however, in addition to the cocaine confiscated from defendant, he also had on his person upon arrest four brass cocaine straws, one cocaine spoon, and a brass cigarette case containing six marijuana cigarettes and 25 capsules of Phendimetrazine Tartrate, a controlled substance. Also confiscated was $3,497.78 in U.S. Currency.

MENTAL & PHYSICAL HEALTH:

The defendant is in good physical health and has not been hospitalized for any illnesses or diseases recently.

IN THE OAKLAND COUNTY CIRCUIT COURT,
PONTIAC, MICHIGAN

(Caption Omitted in Printing)

[2] Pontiac, Michigan
Thursday, April 30, 1987

THE COURT: Mr. Spiekerman?

MR. SPIEKERMAN: Thank you. May it please the Court, Your Honor, Charles Spiekerman on behalf of the People.

I would at this time like to call the case of the People versus Ronald Harmelin. It is file number CR. 86-73784.

Your Honor, Mr. Harmelin was convicted at bench trial on February 27th of this year by Your Honor, and sentencing was originally scheduled for March but had to be adjourned to get a pre-sentence report until today's date. Defendant was convicted of Count I, which is possession with intent to deliver of more than six hundred and fifty grams of a controlled substance, to-wit: Cocaine, which carries a mandatory sentence of life, and Count II, possession of a firearm during the commission of a felony, which carries a mandatory sentence of two years incarceration.

Your Honor, defendant is here to be sentenced on the two counts.

MR. RUNDELL: May it please the Court, Curtis [3] Rundell appearing on behalf of the respondent who, of course, is here for sentencing.

The record should reflect this is the adjourned date for sentencing. Defendant is prepared to proceed to sentencing. I have had an opportunity to go through the pre-

sentence report. As to the factual allegations only, I have no difficulty with them. I believe them to be accurate.

As to any other commentary, Your Honor tried this case without a jury. You know as much about this case as anyone is going to know, period, and so I'm sure the Court will not be affected by that. I think the sentence is mandatory. The defendant understands that, and the defendant is prepared for sentencing.

THE COURT: Is there anything, Mr. Harmelin, sir, you'd like to say before I sentence you, sir?

DEFENDANT HARMELIN: No, sir.

THE COURT: Then the Court, as Mr. Rundell points out, has no discretion in connection with this matter. The sentences in connection with the charge are mandatory, and I will sentence you therefore accordingly.

In connection with the possession of a controlled substance over six hundred and fifty grams, to-wit: Cocaine, I sentence you to the mandatory life in [4] connection with this with credit for three hundred and fifty-three days served to date.

In addition, in connection with the felony firearm, and this must be consecutive as I understand it, I sentence you to the two-year mandatory for the possession of a firearm in the commission of a felony.

There are no guidelines, no criteria necessary.

Mr. Rundell, you had something you wanted to add, sir?

MR. RUNDELL: Yes, Your Honor. It may be moot, although it may not be, but nevertheless as I understand

the law, the felony firearm sentence is one which must be served first with the consecutive sentence being on the life.

MR. SPIEKERMAN: That is correct, Your Honor.

MR. RUNDELL: My question, I guess, is to which sentence do we apply the three hundred and fifty-three days of jail time.

THE COURT: Actually, in essence, the three, fifty-three, I guess, would go to the two-year mandatory portion.

* * *

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v RONALD ALLEN HARMELIN, Defendant-Appellant.	)	JAN 09 1989 No. 101536

Before: Wahls, P.J., Hood and N.J. Kaufman*, JJ.

PER CURIAM

Defendant, Ronald Allen Harmelin, was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2), and was sentenced on April 30, 1987, by the Oakland Circuit Court to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. On appeal, defendant argues that his convictions must be reversed because the evidence against him was obtained as a result of an unconstitutional seizure and pat-down search of his person and an unconstitutional search of his car; that his convictions must be reversed because he was deprived of the effective assistance of counsel; and that his sentence

* Retired Court of Appeals judge, sitting on the Court of Appeals by assignment.

for the cocaine conviction must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constittutes [sic] cruel and unusual punishment. We find that defendant's convictions must be reversed because the evidence used against him was obtained as a result of an unconstitutional seizure of his person.

The record reveals that in the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. Numerous stolen vehicles had been found in this lot in the past. At this time, the officers observed defendant's car exiting the parking lot, and although they were called away on other police business at various times that morning, they saw defendant's car entering the Embassy Motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of defendant's car, the officers noticed nothing unusual or illegal in the manner in which defendant's car was being driven.

Shortly after 5:00 a.m., while continuing to patrol the area around the Embassy Motel, Officers Rix and Blakeney saw defendant's car make a U-turn at the intersection of Eight Mile and Hubbell Roads, a high-crime area, without stopping for a red light. When the officers, in their patrol car with its overhead lights flashing, pulled behind defendant's vehicle, defendant responded by stopping in a reasonably prompt fashion. Officer Rix walked to the driver's side of defendant's car, while Officer Blakeney positioned himself at the passenger side

of the car. Defendant, who remained seated in his car, complied in a cooperative manner upon being requested by Officer Rix to produce a driver's license and vehicle registration. Defendant then stepped out of his car. Neither of the officers could recall whether defendant was ordered out of his vehicle or whether he got out of it on his own initiative, although Officer Rix testified that if he did in fact order defendant out of the car, that order would have been prompted solely by the nervous behavior exhibited by defendant – behavior described as defendant's having "trouble getting some of the words out." In any event, after exiting his car, defendant, in a nervous manner, informed Officer Rix that he was carrying a pistol concealed in an ankle holster. He explained that he had a permit for the weapon, however, and that he did not want the officers to become alarmed. He then handed Officer Rix a general permit to carry a concealed weapon as well as a safety inspection certificate for the .38 caliber, five-shot revolver, which was later found in his ankle holster.

After looking at the firearm documents proffered by defendant, Officer Rix observed nothing which suggested that the papers were possibly invalid. Nonetheless, because defendant appeared to be nervous, because he was armed, albeit legally, and because he had a bulge in one of his coat pockets, Officer Rix, fearing for his own safety and sensing that "[t]here was something wrong," decided to conduct a pat-down search of defendant. In doing so, some marijuana was discovered, and defendant was placed under arrest.

In searching defendant after his arrest, the officers found other incriminating evidence in defendant's possession, including assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper. Later, pursuant to the standard policy of the Oak Park police department, defendant's car was impounded for a possible forfeiture action, and an inventory search was conducted. During this search, a satchel containing a shaving-kit bag was discovered in the trunk. The kit contained $2900 in cash and two bags of white powder subsequently determined to be 672.5 grams of cocaine. A fingerprint expert testified that defendant's fingerprints were found on books located inside the satchel and next to the bags of cocaine.

Defendant neither testified in his own behalf nor presented any witnesses.

On appeal, defendant first argues that the detention and pat-down search conducted by the police violated his Fourth Amendment right to be secure against unreasonable seizures and did not fall within the stop-and-frisk exception to the warrant requirement first enunciated in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), because the detention and search could not be justified by any articulable suspicion or objective manifestation that he was engaged, or about to be engaged, in criminal activity. In *Terry*, the *locus classicus* of stop-and-frisk law, the United States Supreme Court created a limited exception to the requirement of showing probable cause in the seizure of a person by a police officer if the officer had a reasonable, articulable suspicion that the person committed, or was about to commit, a crime. Under the *Terry*

rule, once an officer has reasonably concluded that criminal activity may be afoot, he can conduct a pat-down search if he reasonably concludes that the person seized may be armed and dangerous. See *People v Payton*, 166 Mich App 428, 430-431; 421 NW2d 191 (1988); *People v Peyton*, 167 Mich App 230, 236-237; 421 NW2d 643 (1988). In the present case, defendant, prior to trial, moved to suppress the narcotics evidence against him on the ground that the detention and pat-down search to which he was subjected violated his Fourth Amendment rights. Of course, it is well established that evidence derived from an illegal seizure must be suppressed as the "fruit of the poisonous tree." *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); *People v. Shabaz*, 424 Mich 42, 65; 378 NW2d 451 (1985), cert dis ___ US ___; 106 S Ct 3326; ___ L Ed 2d ___ (1986). The trial court denied defendant's pretrial suppression motion. This Court will not disturb a trial court's ruling on a suppression motion unless that ruling is clearly erroneous. *Payton, supra*, p 430; *Peyton, supra*, p 235; *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1986). We will find such a ruling clearly erroneous if firmly convinced that a mistake has been made. *People v Daniels*, 160 Mich App 614, 617; 408 NW2d 398 (1987).

In the present case, defendant, without doubt, was lawfully stopped for running a red light, which is a civil infraction, MCL 257.611; MSA 9.2311; *People v Laube*, 154 Mich App 400, 407; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987). It seems fairly clear that after defendant was lawfully stopped and produced his driver's license and vehicle registration, Officer Rix ordered defendant to get out of his car. Although defendant did not testify, and

thus did not inform the court that he was in fact ordered out of his car, and although Officer Rix could not remember whether he ordered defendant out of his car or whether defendant exited the automobile of his own accord, it seems highly unlikely to us that, under the circumstances presented in this case, defendant would have gotten out of his car without being told to do so. The question thus becomes whether this escalation in the intrusiveness of the stop was justified by the traffic violation alone and, if not, whether the additional detention was supported by a reasonable, articulable basis on the part of the police for suspecting criminal activity. We are mindful, during our examination of this matter, that "the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention." *Burrell, supra*, 457.

With respect to the Fourth Amendment of the United States Constitution, the reasonableness of requesting a driver to get out of a vehicle following a lawful traffic stop has been answered by the United States Supreme Court in *Pennsylvania v Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). In *Mimms*, a majority of the Supreme court held that a police officer's order to a driver to exit his car after the car was lawfully stopped for a traffic violation did not violate the Fourth Amendment, even though the officer had no reason to suspect foul play at the time, since the obvious interest in the officer's safety outweighed the *de minimus* intrusion involved in what was described as "at most a mere inconvenience" to the driver. 98 S Ct 333. The *Mimms* majority noted that, according to one study, approximately 30% of police shootings occurred when a police officer

approached a suspect seated in an automobile and that the hazard of accidental injury from passing traffic to an officer standing on the driver's side of a stopped vehicle may also be appreciable in some situations. Accordingly, under federal law, once a police officer has stopped a vehicle for a traffic violation he has the authority, without more, to order the driver out of the car.

In the dissent in *Mimms* written by Justice Stevens and in which Justices Brennan and Marshall joined, it is stated that "[t]he Court has based its legal ruling on a factual assumption about police safety that is dubious at best [and] . . . has created an entirely new legal standard of justification for intrusions on the liberty of the citizen." 98 S Ct 337. Regarding the majority's reliance on one study's statistical finding that "approximately 30% of all police shootings occurred when the police officer approached a suspect seated in an automobile," 98 S Ct 333, Justice Stevens stated:

"That statement does not fairly characterize the study to which it refers. Moreover, the study does not indicate that police officers can minimize the risk of being shot by ordering drivers stopped for routine traffic violations out of their cars. The study reviewed 110 selected police shootings that occurred in 1959, 1960, and 1961.[7] In 35 of those cases, 'officers were attempting to investigate, control, or pursue suspects who were in automobiles.'[8] Within the group of 35 cases, there were examples of officers who 'were shot through the windshield or car body while their vehicle was moving'; examples in which 'the officer was shot while dismounting from his vehicle or while approaching the suspect[']s vehicle'; and, apparently, instances in which the officer was shot by a passenger in the vehicle. Bristow, [Police Officer Shootings – A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963)], n. 7, at 93.

"In only 28 of the 35 cases was the location of the suspect who shot the officer verified. In 12 of those cases the suspect was seated behind the wheel of the car, but that figure seems to include cases in which the shooting occurred before the officer had an opportunity to order the suspect to get out. In nine cases the suspect was outside the car talking to the officer when the shooting occurred.

"These figures tell us very little about the risk associated with the routine traffic stop,[9] and they lend no support to the Court's assumption that ordering the routine traffic offender out of his car significantly enhances the officer's safety. Arguably, such an order could actually aggravate the officer's danger because the fear of a search might cause a serious offender to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed. Whatever the reason, it is significant that some experts in this case of human behavior strongly recommend that the police officer 'never allow the violator to get out of the car . . . '[10]

"[7] As the author pointed out, '[n]o attempt was made to obtain a random selection of these cases, as they were extremely hard to collect.' Bristow, Police Officer Shootings – A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963).

"[8] *Ibid.* Since 35 is 32% of 110, presumably this is the basis for the '30%' figure used in the Court's statement. As the text indicates, however, not all of these cases involved police officers approaching a parked vehicle. Whether any of the incidents involved routine traffic offenses, such as driving with an expired license tag, is not indicated in the study.

"[9] Over the past 10 years, more than 1,000 police officers have been murdered. FBI, Uniform Crime Reports 289 (1977). Approximately 10% of those killings, or about 11 each year, occurred during 'traffic pursuits and stops,' but it is not clear how many of those pursuits and stops involved offenses such as reckless or high-speed driving, rather than offenses such as driving on an expired license, or how often the shootings could have been avoided by ordering the driver to dismount.

"[10] '2. *Never allow the violator to get out of the car* and stand to its left. If he does get out, which should be avoided, walk him to the rear and right side of the car. Quite obviously this is a much safer area to conduct a conversation.' V. Folley, Police Patrol Techniques and Tactics 95 (1973) (emphasis in original).

"Another authority is even more explicit:

"The officer should stand slightly to the rear of the front door and doorpost. This will prevent the violator from suddenly opening the door and striking the officer. In order to thoroughly protect himself as much as possible, the officer should reach with his weak hand and push the lock button down if the window is open. This will give an indication to the driver that he is to remain inside the vehicle. It will also force the driver to turn his head to talk with the officer.

"The officer should advise the violator why he was stopped and then explain what action the officer intends to take, whether it is a verbal or written warning, or a written citation. If the suspect attempts to exit his vehicle, the officer should push the door closed, lock it, if possible, and tell the driver to 'please stay in the car!' Then he should request [the] identification he desires and request the violator to hand the material out of the window away from the vehicle. The officer should not stare at the identification but [should] return to his vehicle by backing away from the suspect car. As the patrolman backs away, he should keep his eyes on the occupant(s).

"The officer should remain outside of the patrol unit to use the radio or to write a ticket. The recommended position for him at this time would be to the right side of the patrol unit. Should the driver of the violator vehicle make exit from his seat, the officer should direct the violator to the rear center of his vehicle or the front center area of the patrol unit. Preferably, the officer should verbally attempt to get the violator to reenter and remain in the vehicle." A Yount, Vehicle Stops Manual, Misdemeanor and Felony 2-3 (1976).

"Conflicting advice is found in an earlier work, G. Payton, Patrol Procedure 298 (4th ed. 1971). It is worth noting that these authorities suggest that any danger to the officer from passing traffic may be greatly reduced by the simple and

unintrusive expedient of parking the police car behind, and two or three feet to the left of, the offender's vehicle. *Folley, supra*, at 93; *Payton, supra*, at 301; *Yount, supra* at 2." 98 S Ct 337-338.

The dissent by Justice Stevens also notes that a state is free to provide its citizens with greater protection in this matter than that afforded under the Fourth Amendment of the United States Constitution. 98 S Ct 336. It is well established that state constitutions can provide greater protections than those afforded by the federal constitution. *People v Thompson*, 424 Mich 118, 125; 379 NW2d 49 (1985).

We agree with the dissent of Justice Stevens in *Mimms* and therefore hold that a police officer, after stopping an automobile for a traffic violation, may not order the driver to exit the car, and thus protract the detention, unless the test announced in *Terry* has been fulfilled, *i.e.*, unless the officer had a reasonable, articulable suspicion that the driver committed, or was about to commit, a crime. Maintaining the *Terry* standard in situations involving traffic stops by police officers will help to ensure that the right to be free from unreasonable seizures will not wholly be eroded in traffic offense cases and, as a corollary, that citizens will not lawfully be vulnerable to unnecessary, intrusive and intimidating police commands. As observed by Justice Stevens, the risk to a police officer in the context of a legitimate traffic stop cannot be so universal as always to constitute a reasonable justification for ordering a citizen out of his car.

"The commuter on his way home to dinner, the parent driving children to school, the tourist circling the Capitol, or the family on a Sunday afternoon outing hardly pose the same threat as a driver curbed after a high-speed chase through a high-crime area late at night. Nor is it universally true that the driver's interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority. Whether viewed from the standpoint of the officer's interest in his own safety, or of the citizen's interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of traffic stops that occur every year are not fungible." 98 S Ct 338.

In addition, maintaining the *Terry* standard in this context will help to avoid the arbitrary exercise of the power to force a citizen out of his car in those many, many circumstances in which there exist no suspicions for fearing the driver but, for instance, because of the political message of a bumper sticker on the car or the color of the driver's skin, the driver is nevertheless legally obliged to obey submissively the instruction of a police officer. The line between unfettered discretion and discrimination is a fine one indeed.

We are aware that the majority decision in *Mimms* has been cited by this Court with apparent approbation. In *People v Laube*, 154 Mich App 400, 408-410; 397 NW2d 325

(1986), lv den 428 Mich 856 (1987), for example, a panel of this court, citing *Mimms*, rejected an argument by the defendant that a stop for the civil infraction of walking on the shoulder of a road with, and not against, traffic, MCL 257.655, MSA 9.2355, did not authorize the stopping deputies to extend his detention or conduct a frisk. In *Laube*, however, the defendant himself "consented to, and indeed, appears to have initiated, an extended contact with the officers," and "repeatedly placed his hands in his pockets while inching towards the rear of the patrol car." 154 Mich App 410. These circumstances created a legitimate concern on behalf of the officers regarding their safety. Moreover, in *People v Blackburne*, 150 Mich App 156, 164-165; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986), a panel of this Court, citing *Mimms*, found that the detaining, and pat-down searches, of the defendant and three other men were not unreasonable after the driver of the car in which the men were travelling committed a traffic violation by driving on the wrong side of the center line for a distance of about 1/8th of a mile. In *Blackburne*, however the police had reasonable, articulable suspicions that criminal activity was afoot even before stopping the car for the traffic violation. Before stopping the car and subjecting its driver and passengers to detainment, "[t]he police officers reasonably suspected that the four men in the car were engaged in drug shipment activity." 150 Mich App 164. Thus, while both *Laube* and *Blackburne* cite *Mimms*, neither case, to support its result, relies exclusively on the holding in *Mimms*.

We find added support in *People v Burrell*, 417 Mich 439; 339 NW2d 403 (1983), for our conclusion that the Michigan constitutional provision regarding freedom

from unreasonable searches and seizures, Const 1963, art 1, § 11, affords more protection to individuals such as the present defendant than that provided under federal constitutional law. In *Burrell*, the defendant's vehicle was legitimately stopped by police for violation of a statute prohibiting excessively noisy exhaust systems, MCL 257.707; MSA 9.2407. This legitimate stop revealed that the driver had no driver's license or vehicle registration. Thus, the police reasonably suspected that the vehicle was stolen. The Supreme Court, stressing that the intrusiveness of police activity must be carefully limited to the circumstances justifying the detention, found that the police were able to detain the defendants only so long as to write citations for the noisy exhaust system and – after determining by way of a LEIN check that the driver was licensed and that the car was not reported as stolen – the driver's failure to have in his possession a valid driver's license. The Court stated:

"Analytically, given this state of facts, it is clear that more than one roadside detention occurred. Initially, driver Brown was properly stopped for an equipment violation. A detention following a stop for such a minor violation would be justified only for the length of time necessary to write a citation. Here, however, the stop immediately revealed a new set of circumstances, a driver without either a operator's license or a vehicle registration. We agree that it was reasonable to suspect that the vehicle was stolen, and we also agree that detention was justified long enough to resolve the suspicion raised. When the LEIN check verified that Brown was licensed and that the car was not reported stolen, that suspicion expired. By 7:15 p.m., detention, again, could be justified

only for the length of time required for Blackport to write a citation for Brown's failure to have a valid driver's license in his possession while driving."

Although this statement concerns only the duration of a detention, it is clearly implied that the manner of a detention should be no more intrusive than that necessary to address the issue or issues justifying the detention in the first place. In this regard, the Supreme Court made the following observations and statements:

"In [*United States v*] *Brignoni-Ponce*, [422 US 873, 881-882; 95 S Ct 2574; 45 L Ed 2d 607 (1975)], the United Supreme Court applied the *Terry* 'stop and frisk' doctrine to investigatory stops of automobiles by a roving border patrol. The Court condemned a random stop of a vehicle made because its three passengers appeared to be of Mexican descent. The Court concluded that appearance alone was an insufficient basis to allow a random stop and brief questioning. This result flowed naturally from the *Terry* requirement that more than 'inchoate and unparticularized suspicion or 'hunch' ' was necessary to justify a frisk of a suspicious individual.

* * *

"In *Delaware v Prouse*, [440 US 648; 99 S Ct 1391; 59 L Ed 2d 660 (1979)], the Court required that a police officer who stops and detains a motorist to check for a valid driver's license and registration have at least an articulable and reasonable suspicion that the motorist is unlicensed or that the vehicle is not registered. The officer in the case testified that he had not observed traffic or equipment violations or any suspicious activity prior to

making the stop. The Court ruled that his stop was unreasonable.

"In the instant case, we do not deal with any improper stop. Therefore, neither *Brignoni-Ponce* nor *Delaware v Prouse* is dispositive. However, since a stop almost inevitably leads to a brief detention for questioning, we draw guidance from these decisions as to the standard applicable to a brief detention *on an unrelated matter* following an otherwise lawful stop. Proceeding from the premise that a brief detention is at least as intrusive for Fourth Amendment purposes as a stop, we conclude that a brief detention for questioning is permissible if based on a reasonable and articulable suspicion of criminal activity.

"Since fourth Amendment rights are involved in a detention, however brief, the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention." (Footnotes omitted; emphasis in original.) 417 Mich 455-457.

The evidence in the present case is clear that Officer Rix had no reasonable, articulable suspicion that defendant was engaged in criminal activity at the time he, presumably, was ordered out of his car. At that time, Officer Rix knew that defendant's car had frequently gone in and out of a motel parking lot during the early morning hours of May 12, 1986; that numerous stolen cars had been found in the parking lot in the past; that defendant had illegally run a red light in a high-crime area; and that defendant complied in a cooperative manner upon being requested to produce his driver's license and vehicle registration. We fail to see how any "specific

reasonable inferences of criminal activity could possibly be drawn from these facts." *Burrell, supra,* p 458. Either taken singly or *in toto,* they suggest to us nothing particularly nefarious, illicit, improper or illegal. It is only after defendant got out of his car that questions of safety arose, *i.e.,* it was only after defendant got out of his car that defendant began acting nervously, displayed a bulge in a coat pocket, and produced a gun, for which he possessed a facially valid general permit and safety inspection certificate. This latter evidence, however, was discovered only after the police escalated defendant's detention from that of a mere traffic citation incident to something more. Applicable here is the *Burrell* Court's observation that, "rather than having a crime and looking for the criminal[], the police, here, had the 'criminal[]' and were looking for the crime." 417 Mich 459. While the results of such police activity may – and in this case, were – very efficacious, such ends, in a constitutional matter as that now in issue, cannot justify the means employed. As also noted by the Supreme Court in *Burrell,* it is of course painful to suppress otherwise good and highly incriminating evidence that led to a defendant's conviction, but the loss of that evidence "is balanced by the fact that it is only in difficult situations such as those presented here that we can draw the fine lines between the authority of the police to protect us from crime and the use by the police of governmental power to violate our constitutional rights." *Id.*

Accordingly, having reviewed the entire record in this case, we are firmly convinced that the trial court erred in denying defendant's pretrial motion to suppress the narcotics evidence used against him at trial because we are unable to find specific facts which would support

a reasonable suspicion of criminal activity sufficient to justify ordering defendant out of his car after being stopped for a simple traffic violation. Since the incriminating evidence in this case was the fruit of an illegal detention effected by the police, it should have been suppressed. *Wong Sun, supra; Shabez, supra.*

In light of our decision to reverse defendant's convictions on the basis of his illegal detention, the other issues he raises on appeal need not be addressed. *Burrell, supra,* p 460, n 30.

Reversed.

/s/ Myron H. Wahls
/s/ Harold Hood

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

No. 101536

v

RONALD ALLEN HARMELIN,

Defendant-Appellant.

Before: Wahls, P.J., and Hood and N.J. Kaufman,* JJ.

N.J. Kaufman, J. (dissenting)

I vigorously disagree with the majority's hinging review of this case on the assumption that Officers Rix and Blakeney ordered defendant out of his car. The record reflects that neither officer could recall whether defendant was ordered out of his car or whether defendant simply got out on his own initiative, and defendant did not testify.

Unlike the majority, I do not find it in the least unlikely that defendant would have exited his car without being told to do so. To the contrary, given the contraband contained in the trunk of defendant's car, I find it very understandable that defendant would get out and as far away from his car as he could. The majority's assumption concerning defendant's actions is justified by neither the record nor defendant's brief on appeal, the later of which is void of any reference to the theory adopted by the majority.

Clearly, defendant was lawfully stopped for running a red light, a civil infraction, MCL 257.611; MSA 9.2311. *People v Burrell,* 417 Mich 439, 450; 339 NW2d 403 (1983); *People v Laube,* 154 Mich App 400, 407; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987). The police officers, in conducting the pat-down search, must have concluded that defendant was armed and dangerous based on a specific, articulable, reasonable inference drawn from the facts for the frisk to have been a reasonable intrusion upon defendant's Fourth Amendment rights. *Terry v Ohio,*

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

392 US 1, 32; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *Michigan v Summers*, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981); *People v Backburne*, 150 Mich App 156, 164; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986).

In this case, defendant volunteered the fact that he was carrying a gun, for which he had a general permit, in a holster strapped to his ankle. Seeing what he believed were several bulges in defendant's coat, Officer Rix suspected that defendant was carrying other undisclosed weapons on his person. This suspicion was enhanced by defendant's extremely nervous demeanor and their location in a high crime area, and Officer Rix became concerned for his own safety. Although these facts may not justify a pat-down search if considered separately, when considered together the pat-down search was a justifiable intrusion upon defendant's Fourth Amendment rights. The purpose of the pat-down search was not to discover evidence of a crime, but to protect the officers from harm by seizing suspected weapon or weapons. *Terry*, 392 US 23; *Adams v Williams*, 407 US 143, 146; 92 S Ct 1921, 1923; 32 L Ed 2d 612, 617 (1972); *Pennsylvania v Mimms*, 434 US 106, 110; 98 S Ct 330, 333; 54 L Ed 2d 331, 336-337 (1977); and *Ybarra v Illinois*, 444 US 85, 93; 100 S Ct 338, 343; 62 L Ed 2d 238, 247 (1979).

There is no need to strain for reversal by following the dissent in *Mimms*, as the majority in this case has done, because the *Terry* test was met: the officers had a reasonable, articulable suspicion that defendant was armed and a danger to their safety.

Nor do any of defendant's four other claims on appeal require reversal.

First, defendant argues that his right not to be compelled to testify against himself was violated when Officer Rix asked him about the hard object felt in defendant's chest pocket. This conversation took place prior to defendant's arrest. Officer Rix believed the hard object was another gun, and asked defendant what it was. Defendant replied that it was his marijuana. The limited constraint conferred upon defendant's freedom by the officers conducting the pat-down search does not rise to the level of a custodial interrogation, and precludes a finding that defendant's admission was compelled by police action. *People v Hill*, 429 Mich 382, 397; 415 NW2d 193 (1987).

Second, the warrantless search of defendant's car was not an unjustifiable intrusion upon defendant's Fourth Amendment rights such that the fruits of this search should have been suppressed. Defendant's car was properly impounded under the forfeiture provisions on the Controlled Substance Act, MCL 333.7522; MSA 14.15(7522). However, because the officers' testimony established that the Oak Park Police Department's standardized procedure did not mandate searching and conducting an inventory of the contents of every container within the vehicle, the inventory search done in this case does not fall within the parameters of *Colorado v Bertine*, 479 US ___; 107 S Ct 738; 93 L Ed 2d 739 (1987); *People v Krezen*, 427 Mich 681; 397 NW2d 803 (1986).

I would find that the search in this case falls under the automobile exception to the warrant requirement enunciated in *United States v Ross*, 456 US 789; 102 S Ct 2157; 72 L Ed 2d 572 (1982), and adopted by this Court in *People v Cruz*, 161 Mich App 238, 241-242; 409 NW2d 797

(1987), lv den 430 Mich 854 (1988). Ten clear plastic bags filled with white powder, three small vials containing white powder, assorted pills and capsules, paraphernalia of the type used to ingest cocaine, and a telephone paging device were retrieved from defendant's person after his arrest, and a gun was strapped to defendant's ankle when the officers stopped him. These facts would lead a reasonably prudent person, thus police had a probable cause, to believe that defendant's car contained more controlled substances. *People v Goins*, 164 Mich App 559, 560; 417 NW2d 499 (1987). Although the trial court's denial of the suppression motion was not based on the automobile exception to the warrant requirement, reversal is not mandated where the trial court reaches the right result for the wrong reasons. *People v Beckley*, 161 Mich App 120, 131; 409 NW2d 759 (1987), lv gtd on other grds 430 Mich 857 (1988).

Third, under either the Michigan or federal standard,[1] defendant's claims that he was deprive of the effective assistance of counsel and the right to plead not guilty because (1) his trial counsel offered no evidence in response to the prosecutor's case-in-chief, but solely confined the defense to attacking the admissibility of evidence found on defendant's person and in his car, and (2) counsel did not argue that defendant was not guilty of knowingly possessing the cocaine found in his truck, are both without merit. The evidence against defendant was overwhelming, and counsel's strategy in concentrating the defense on the admissibility of the disputed evidence focused upon defendant's best and only chance of acquittal. This choice of strategy was not the functional equivalent of a guilty plea proscribed in *People v Schulz*, 85 Mich

App 527; 271 NW2d 305 (1978), and defendant was afforded his constitutional right to plead not guilty. *People v Fisher*, 119 Mich App 445; 326 NW2d 537 (1982).

Defendant's last claim is that the mandatory sentence of life imprisonment is entirely out of proportion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by US Const, Am VIII, and Const 1963, art 1, § 16. I disagree. See *People v Harding*, 163 Mich App 298, 329; 413 NW2d 777 (1987), vacated on other grds 430 Mich 858-859 (1988).

I would affirm defendant's convictions and sentence.

/s/ Nathan J. Kaufman

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[1] *People v Garcia*, 398 Mich 250; 247 NW2d 547 (1976), sets forth the Michigan standard; the federal standard is set forth in *Strickland v Washington*, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and was applied in *People v Dalessandro*, 165 Mich App 569, 574-575; 419 NW2d 609 (1988)

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

(Caption Omitted In Printing)

Myron H. Wahls

Presiding Judge

Harold Hood
Nathan J. Kaufman

Judges

This Court having issued a judgment in this case on January 9, 1989, and precedent, uncited by the parties, affecting the analysis of an issue in that judgment having come to the attention of the Court,

IT IS ORDERED, on the Court's own motion, that the January 9, 1989, judgment is vacated, the decision to publish is reversed, and the case is retained for the issuance of a judgment on reconsideration.

/s/ Harold Hood

STATE OF MICHIGAN

COURT OF APPEALS

(Caption Omitted In Printing)

April 18, 1989
FOR PUBLICATION
No. 101536
(On Reconsideration)

Before: Wahls, P.J., Hood and N.J. Kaufman*, JJ.

PER CURIAM.

On March 9, 1989, this Court, on its own motion, vacated its judgment in this case issued on January 9, 1989, and retained the matter for reconsideration. Of concern was the effect of a constitutional provision and its case-law precedent, uncited by the parties, on the issue of the propriety of a police officer ordering a driver out of his car after having stopped the driver for a traffic violation. Two judges of this panel concluded that the Michigan Constitution's search-and-seizure provison provided greater protection to drivers in such a situation than that available under the analogous provision of the federal constitution. Under the latter, a police officer's order to a driver to exit his car after the car has been lawfully stopped for a traffic violation does not violate the Fourth Amendment even though the officer had no reason to suspect foul play at the time. *Pennsylvania v Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977).

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*Retired Court of Appeals judge, sitting on the Court of Appeals by assignment.

The third judge of this panel, writing in dissent, concluded that the record did not support the assumption that defendant was ordered out of his car by the police and, on the contrary, suggested that defendant had voluntarily gotten out of his car after having been lawfully stopped for a traffic violation.

On reconsideration, we hold that, even if defendant in this case were ordered out of his car by the police after having been legally stopped for a traffic violation, the narcotics evidence revealed after subsequent searches could not have been suppressed from evidence under the Michigan Constitution's search-and-seizure provision because, under the circumstances in this case, the provision affords defendant with no greater protection than that provided under the analogous federal provision in the Fourth Amendment. Regarding the remaining issues raised by defendant on appeal and not addressed in the January 9, 1989, majority opinion, we adopt the reasoning and conclusions set forth in the dissenting opinion of that date.

The facts in this case were recited in our earlier opinion:

> "Defendant, Ronald Allen Harmelin, was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2), and was sentenced on April 30, 1987, by the Oakland Circuit Court to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. On appeal, defendant argues that his convictions must be reversed because the evidence against him was obtained as a result of an

> unconstitutional seizure and pat-down search of his person and an unconstitutional search of his car; that his convictions must be reversed because he was deprived of the effective assistance of counsel; and that his sentence for the cocaine conviction must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constitutes cruel and unusual punishment. . . .
>
> "The record reveals that in the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. Numerous stolen vehicles had been found in this lot in the past. At this time, the officers observed defendant's car exiting the parking lot, and although they were called away on other police business at various times that morning, they saw defendant's car entering the Embassy Motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of defendant's car, the officers noticed nothing unusual or illegal in the manner in which defendant's car was being driven.
>
> "Shortly after 5:00 a.m., while continuing to patrol the area around the Embassy Motel, Officers Rix and Blakeney saw defendant's car make a U-turn at the intersection of Eight Mile and Hubbell Roads, a high-crime area, without stopping for a red light. When the officers, in their patrol car with its overhead lights flashing, pulled behind defendant's vehicle, defendant responded by stopping in a reasonably prompt fashion. Officer Rix walked to the driver's side of defendant's car, while Officer Blakeney positioned himself at the passenger side of the car. Defendant, who remained seated in his car,

complied in a cooperative manner upon being requested by Officer Rix to produce a driver's license and vehicle registration. Defendant then stepped out of his car. Neither of the officers could recall whether defendant was ordered out of his vehicle or whether he got out of it on his own initiative, although Officer Rix testified that if he did in fact order defendant out of the car, that order would have been prompted solely by the nervous behavior exhibited by defendant – behavior described as defendant's having "trouble getting some of the words out." In any event, after exiting his car, defendant, in a nervous manner, informed Officer Rix that he was carrying a pistol concealed in an ankle holster. He explained that he had a permit for the weapon, however, and that he did not want the officers to become alarmed. He then handed Officer Rix a general permit to carry a concealed weapon as well as a safety inspection certificate for the .38 caliber, five-shot revolver, which was later found in his ankle holster.

"After looking at the firearm documents proffered by defendant, Officer Rix observed nothing which suggested that the papers were possibly invalid. Nonetheless, because defendant appeared to be nervous, because he was armed, albeit legally, and because he had a bulge in one of his coat pockets, Officer Rix, fearing for his own safety and sensing that "[t]here was something wrong," decided to conduct a pat-down search of defendant. In doing so, some marijuana was discovered, and defendant was placed under arrest.

"In searching defendant after his arrest, the officers found other incriminating evidence in defendant's possession, including assorted pills and capsules, three vials of white powder, ten baggies of white power, drug paraphernalia and

a telephone beeper. Later, pursuant to the standard policy of the Oak Park Police Department, defendant's car was impounded for a possible forfeiture action, and an inventory search was conducted. During this search, a satchel containing a shaving-kit bag was discovered in the trunk. The kit contained $2900 in cash and two bags of white power subsequently determined to be 672.5 grams of cocaine. A fingerprint expert testified that defendant's fingerprints were found on books located inside the satchel and next to the bags of cocaine.

"Defendant neither testified in his own behalf nor presented any witnesses."

In our earlier opinion, we recognized that in *Mimms, supra*, a majority of the United States Supreme Court held that a police officer's order to a driver to get out of his car after the car was lawfully stopped for a traffic violation did not violate the Fourth Amendment, even though the officer had no reason to suspect foul play at the time, and that other panels of this Court have cited *Mimms* with approbation, *People v. Laube*, 154 Mich App 400, 408-410; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987); *People v. Blackburne*, 150 Mich App 156, 164-165; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986). Nevertheless, we decided in our earlier opinion that, under the Michigan Constitution's search-and-seizure provision, a driver such as defendant in the present case should be afforded more protection from the police than is afforded under the Fourth Amendment's prohibition against unreasonable searches and seizures. In doing so, we followed the dissent of Justice Stevens in *Mimms*, and thus declared that a police officer, after stopping an automobile for a traffic violation, could not order the driver to

get out of the car, and thus protract the driver's detention, unless the test announced in *Terry v. Ohio*, 391 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), had been fulfilled, i.e., unless the officer had a reasonable, articulable suspicion that the driver committed, or was about to commit, a crime. We opined the maintaining the *Terry* standard in situations involving traffic stops by police officers would help to ensure that the right to be free from unreasonable seizures would not be wholly eroded in traffic offense cases and, as a corollary, that citizens would not lawfully be vulnerable to unnecessary, intrusive, and intimidating police commands.

On reconsideration, we find that whether Justice Stevens, in his dissent in *Mimms*, had the better argument on this issue is not controlling because in this case we are obliged to follow the majority decision in *Mimms*. The search-and-seizure provision in the Michigan Constitution provides:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. *The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.*" (Emphasis added.) Const 1963, art 1, §11.

The language of this section itself specifies that the protections granted under the section shall not be construed to bar from evidence any narcotic drug seized by a police

officer outside the cartilage of a house. In this case, since the evidence was seized from defendant by the police on the open highway, and therefore outside the curtilage of a house, the protections granted under the state's search-and-seizure provision are not available to defendant. Instead, defendant is entitled only to those protections available to him under the federal constitution. *See People v. Catania*, 427 Mich 447, 466, n 12; 398 NW2d 343 (1986); *People v. Ragland*, 149 Mich App 277, 281; 385 NW2d 772 (1986); *People v. Alfafara*, 140 Mich App 551, 560-561; 364 NW2d 743 (1985). And, as already stated, under federal law, the police were entitled to order defendant out of his car after it was lawfully stopped for a traffic violation. *Mimms, supra.*

After defendant's automobile was lawfully stopped for a traffic violation and after defendant was lawfully ordered out of his car, it is clear that a pat-down search of his person was warranted under the *Terry* standard, i.e., it was reasonable to conclude that criminal activity might have been afoot and that defendant might have been armed and dangerous. *See People v. Payton*, 166 Mich App 428, 430-431; 421 NW2d 191 (1988); *People v. Peyton*, 167 Mich App 230, 236-237; 421 NW2d 643 (1988). Defendant, in a high crime area during early morning hours, was admittedly carrying a pistol in an ankle holster, appeared to be extremely nervous, and had a bulge in one of his coat pockets which led the arresting officer to believe that defendant could have been carrying a second concealed weapon. Fearing for his safety and for that of his partner, and believing that, "[i]f [defendant] had, in fact, guns in his pockets where the bulges were, they could have been used on me, and I wouldn't have had a chance to

respond," the officer conducted a pat-down search on defendant.

In the present case, defendant, prior to trial, moved to suppress the narcotics evidence against him on the ground that the detention and pat-down search to which he was subjected violated his Fourth Amendment rights. It is well established that evidence derived from an illegal seizure must be suppressed as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); *People v. Shabaz*, 424 Mich 42, 65; 378 NW2d 451 (1985), cert dis 478 US 1017; 106 S Ct 3326; 92 L Ed 2d 733 (1986). The trial court denied defendant's pre-trial suppression motion. This Court will not disturb a trial court's ruling on a suppression motion unless the ruling is clearly erroneous. *Payton, supra*, p 430; *Peyton, supra*, p 235; *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). We will find such a ruling clearly erroneous if firmly convinced that a mistake has been made. *People v Daniels*, 160 Mich App 614, 617; 408 NW2d 398 (1987). We discern no reason to disturb the trial court's ruling in this case.

Regarding the remaining issues raised on appeal by defendant, we agree with the reasoning and conclusions set forth in the dissenting opinion filed with our January 9, 1989, decision. We will review very briefly each of those issues.

First, defendant argues that his right not to be compelled to testify against himself was violated when Officer Rix asked him about the hard object felt in defendant's chest pocket. This conversation took place prior to defendant's arrest. Officer Rix believed that the

hard object was another gun and asked defendant what it was. Defendant replied that it was marijuana. The limited constraint placed upon defendant's freedom by the officer conducting the pat-down search does not rise to the level of a custodial interrogation and precludes a finding that defendant's admission was compelled by police action. *People v. Hill*, 429 Mich 382, 397; 415 NW2d 193 (1987).

Second, the warrantless search of defendant's car was not an unjustifiable intrusion upon his Fourth Amendment rights such that the fruits of this search should have been suppressed. Defendant's car was properly impounded under the forfeiture provisions of the Controlled Substances Act, MCL 333.7522; MSA 14.15 (7522). However, because the officers' testimony in the present case established that the Oak Park Police Department's standardized procedures did not mandate searching and conducting an inventory of the contents of every container within an impounded vehicle such as defendant's, the inventory search done in this case does not fall within the parameters of *Colorado v Bertine*, 479 US ___; 107 S Ct 738; 93 L Ed 2d 739 (1987); *People v. Krezen*, 427 Mich 681; 397 NW2d 803 (1986).

Nevertheless, we find that the search in this case falls within the automobile exception to the warrant requirement enunciated in *United States v Ross*, 456 US 789; 102 S Ct 2157; 72 L Ed 2d 572 (1982); and adopted by this Court in *People v Cruz.*, 161 Mich App 238, 241-242; 409 NW2d 797 (1987), lv den 430 Mich 854 (1988). Ten clear plastic bags filled with white powder, three small vials containing white powder, assorted pills and capsules, paraphernalia of the type used to facilitate the ingestion of

cocaine, and a telephone paging device were retrieved from defendant's person after his arrest. Moreover, a gun was strapped to defendant's ankle when he was stopped by the officers. These facts establish probable cause to believe that defendant's car contained more controlled substances. Probable cause exists when the facts and circumstances warrant a person of reasonable prudence to believe that the evidence of a crime or contraband sought is in a stated place. *People v. Goins*, 164 Mich App 559, 560; 417 NW2d 499 (1987). Although the trial court's denial of the suppression motion was not based on the automobile exception to the warrant requirement, reversal is not mandated where the trial court reaches the right result for the wrong reason. *People v Beckley*, 161 Mich App 120, 131; 409 NW2d 759 (1987), lv gtd on other grds 430 Mich 857 (1988).

Third, under either the Michigan or federal standard,[2] defendant's claims that he was deprived of the effective assistance of counsel and the right to plead not guilty because (1) his trial counsel offered no evidence in response to the prosecutor's case-in-chief, but solely confined the defense to attacking the admissibility of evidence found on defendant's person and in his car, and (2) counsel did not argue that defendant was not guilty of knowingly possessing the cocaine found in his trunk, are both without merit. The evidence against defendant was overwhelming, the counsel's strategy in concentrating the defense on the admissibility of the disputed evidence focused upon defendant's best and only change of acquittal. This choice of strategy was not the functional equivalent of a guilty plea, and defendant was afforded his constitutional right to plead not guilty. *People v. Schulz*, 85

Mich App 527; 271 NW2d 305 (1978); *People v. Fisher*, 119 Mich App 445; 326 NW2d 537 (1982).

Defendant's last claim is that the mandatory sentence of life imprisonment is entirely out of proportion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by US Const, Am VIII, and Const 1963, art 1, §16. We disagree. See *People v Harding*, 163 Mich App 298, 329; 413 NW2d 777 (1987), vacated on other grounds 430 Mich 859 (1988).

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Nathan J. Kaufman

---

[1] *People v Garcia*, 398 Mich 250; 247 NW2d 547 (1976), sets forth the long-accepted Michigan standard; the federal standard is set forth in *Strickland v Washington*, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and was applied in *People v Dalessandro*, 165 Mich App 569, 574-575; 419 NW2d 609 (1988), to a claim brought under the Michigan Constitution.

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

People v Ronald Allen Harmelin

Docket # 101536

L. C. # 86 73784

Myron H. Wahls
Presiding Judge

Harold Hood
Nathan J. Kaufman
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk, on

[SEAL]

April 18, 1989
Date

/s/ Norbert G. Jaworski
Chief Clerk

Michigan Supreme Court
Lansing, Michigan

Order

Entered: January 29, 1990

86374&(45)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD HARMELIN,

Defendant-Appellant.

SC: 86374
COA: 101536
LC: 86-73784-FH

On order of the Court, the delayed application for leave to appeal and the motion for remand are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 29, 1990

/s/ Corbin R. Davis
Clerk

SUPREME COURT OF THE UNITED STATES

No. 89-7272

Ronald Allen Harmelin,

Petitioner

v.

Michigan

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Michigan.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question III presented by the petition.

May 29, 1990

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7272

In The

Supreme Court of the United States

October Term 1990

RONALD ALLEN HARMELIN,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals Of Michigan

BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Whether the mandatory sentence of life imprisonment without possibility of parole for possession of over 650 grams of cocaine without considering mitigating factors such as no prior record and the fact that the petitioner was not a drug kingpin constitutes cruel and unusual punishment prohibited under the Eighth Amendment?

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OPINIONS BELOW

The order of the Michigan Supreme Court denying leave to appeal is published at 434 Mich. 863 (January 29, 1990). The opinion of the Michigan Court of Appeals on reconsideration *sua sponte* is published at 176 Mich. App. 524; 440 N.W.2d 75 (1989). The original opinion of the Michigan Court of Appeals reversing petitioner's conviction, dated January 9, 1989, was unpublished. The judgment of sentence in this case was dated April 30, 1987. Copies of these opinions are reproduced in the Joint Appendix.

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 18, 1989, affirming petitioner's conviction and sentence dated April 30, 1987. On January 20, 1990, the Michigan Supreme Court denied petitioner's application for leave to appeal. On April 2, 1990, petitioner filed his Petition for Writ of Certiorari with this Court. The petition was granted on May 29, 1990. Petitioner then filed a request for court-appointed appellate counsel. This Court appointed counsel. The jurisdiction of this Court is invoked under the Eighth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a violation of the Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner Ronald Allen Harmelin was arrested in Oak Park, Michigan, with 672 grams of cocaine in the trunk of his car. He was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(1)(i); MSA 14.15(7403)(2)(a)(i), (Pet. App. – statute) and felony firearm, MCL 750.227b; MSA 28.424(2). On April 30, 1987, he was sentenced by the Oakland County Circuit Court to a mandatory life term of imprisonment with no parole, and a two-year term for the felony-firearm conviction.

In the early morning hours of May 12, 1986, two police officers stopped the petitioner, Ronald Harmelin, for failure to make a complete stop at a red light. The petitioner complied in a cooperative manner upon being requested to produce a driver's license and vehicle registration. Mr. Harmelin voluntarily informed one of the officers that he was carrying a pistol in an ankle holster (Evidentiary Hearing of November 12, 1986, hereafter referred to as EH 1, p. 11). Petitioner then handed the officer a valid permit to carry a concealed weapon. Ultimately, Mr. Harmelin's person was searched and the officers discovered in his pockets some marijuana cigarettes, assorted pills, ten small packets of cocaine, (one such packet was analyzed and found to contain 0.14 grams of a mixture containing cocaine)(J.A. – Trial Exhibit #16, the chemist's lab sheet, p. 2), three little vials of cocaine, and a telephone pager (EH 1, pp. 1-14). Later, the police impounded the 1977 Ford and searched the trunk. The search revealed a closed travel bag. Inside the travel bag was a closed shaving kit bag containing $2900 and two bags containing 672.5 grams of cocaine (EH 2, p. 41). Mr.

Harmelin's fingerprints were found on a book inside the travel bag (Trial Transcript of February 26, 1987, hereafter referred to as TT, p. 98). His fingerprints were not found inside the shaving kit which contained the money and the cocaine (TT, p. 106).

Defendant neither testified in his own behalf nor presented any witnesses. He was convicted as charged and sentenced to mandatory life imprisonment without possibility of parole.

The presentence report reveals that Mr. Harmelin had no prior contacts with the criminal justice system (J.A. Presentence report, p. 1). He graduated from Sterling High School in Sommerdale, New Jersey in 1983. Mr. Harmelin entered the US Air Force and was stationed at Bolling AFB near Washington, D.C., where he was in the Honor Guard for four years. He was honorably discharged in 1967.

The presentence report revealed that petitioner admitted he was a drug addict. He denied an addiction to cocaine which was contradicted by the fact that he had four brass cocaine straws and one cocaine spoon in his pocket, as well as a small amount of cocaine. (J.A. presentence, p. 4)

Petitioner was unemployed at the time of the offense. Petitioner owned the 9 year old Ford automobile and had $597.00 in his pocket. He had no other assets. He resided at an apartment in Detroit. (J.A. presentence report, p. 6)

The presentence report described the petitioner as a largescale drug dealer, estimating the value of the cocaine

he was carrying between $67,000 and $100,000. They offered no proof of his role in the drug trafficking hierarchy, and nothing that would dispute the fact that he was a "mule of transport". The contents of the presentence report were not challenged, indeed they were not mentioned at the sentencing hearing, because of the mandatory nature of the sentencing statute.

On appeal, petitioner argued that his convictions must be reversed because the evidence against him was obtained as a result of an unconstitutional search; that he had been deprived of the effective assistance of counsel; and that his sentence must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constitutes cruel and unusual punishment. The Michigan Court of Appeals reversed his conviction in an opinion dated January 9, 1989, stating that the search was unconstitutional (J.A.).

In an order dated March 9, 1989, the Michigan Court of Appeals vacated that judgment (J.A.).

The Michigan Court of Appeals denied a Motion for Rehearing on April 18, 1989 (J.A.). In an opinion (on reconsideration) dated April 18, 1989, they affirmed his conviction (J.A.).

The Michigan Supreme Court denied leave to appeal on January 29, 1990 (J.A.).

The petitioner filed a petition for writ of certiorari on April 2, 1990. The petition was granted on May 29, 1990.

SUMMARY OF THE ARGUMENT

Ronald Harmelin is 45 years old. He will never live free in our society or any other society again. He has been sentenced to life in prison without parole.

Mr. Harmelin did not kill, attempt to kill, or intend to kill. Mr. Harmelin did not commit an act of violence.

Mr. Harmelin was not a repeat offender who had stubbornly resisted rehabilitation; he was never before even arrested for a crime.

Mr. Harmelin was not convicted of drug dealing. He was not shown to be a drug kingpin. His assets, apart from the drugs, consisted of a nine year old Ford automobile.

For the crime of possession of drugs, he was sentenced to prison for life without parole. The trial judge could not consider any of the good things he had accomplished in his life. The trial judge could not consider the circumstances of the crime. The trial judge could not consider the lack of violence on the part of Mr. Harmelin. The trial judge could not consider Mr. Harmelin's possibilities for rehabilitation. The judge had no choice, under Michigan law, to consider any of these factors. The sentence of life in prison without parole was mandatory. Similarly, the Michigan Parole Board cannot consider his rehabilitation. In this case life without parole actually means life without parole.

Petitioner submits that this sentence, imposed against a first-time offender, without consideration of his individual characteristics, and the characteristics of the offense, violates the Eighth Amendment's prohibitions on

cruel and unusual punishment. *Solem v. Helm*, 463 U.S. 277 (1983). A lawful sentencing scheme must be proportionate, and this Court should consider the factors enumerated in *Solem v. Helm, supra*, i.e. the gravity of the offense and the harshness of the penalty, sentences imposed on for other crimes in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions. Legislatures may not constitutionally provide for disproportionate penalties, and it is the duty of this Court to follow the Eighth Amendment even when the state legislature does not.

In Michigan, only possession of 650 grams or more of a controlled substance and the commission of first-degree murder are subject to mandatory life sentences.[1] No other jurisdiction in the United States has penalties even coming close to the harshness of Michigan's. Indeed, if Mr. Harmelin had been sentenced in federal court he would have received a much lighter sentence, even the under the new Sentencing Guidelines.

As Circuit Judge Norman Lippitt of the Oakland County Circuit Court observed:

> "Every thinking person must know that there are many second degree murderers, rapists, kidnappers, and other violent offenders more dangerous to the public welfare than many people who possess over 650 grams of cocaine. Yet the law does not mandate a natural life sentence for each and every such violent criminal. Why then should it do so for the drug possessor?" *People v. Martin, et al.*, #86-74706 (decided 8/20/87)

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[1] Michigan has abolished the death penalty.

The Michigan statute was aimed at the drug kingpins, but seriously misses the mark. The people being sentenced to life in prison are the mules of transport. The real drug kingpins attract the attention of federal agents, and because they have information of value to the government, they can receive a lighter sentence. The mules of transport, who have no valuable information to trade, end up being sentenced to life in prison.

There is no dispute that drug offenses are serious crimes. However, the view that involvement in drugs is equivalent to intent to murder is not rational. While drugs can cause death, they do so in only a small percentage of drug users. They do not cause death with such regularity and certainty that involvement in drugs expresses an intent to kill.

The standards of our society require that we place the highest level of condemnation on the intentional taking of life. No other crime, however disapproved, rises to that level of evil. All other jurisdictions, both state and federal, provide for a sentencing scheme, that is much less harsh than Michigan's. No other jurisdiction in America equates drug possession with murder as to punishment, because respect for human dignity will not allow it.

The petitioner has been sentenced to mandatory life in prison with no possibility of parole. There is an enormous difference between a lengthy sentence and a sentence of mandatory life with no possibility of parole. It is a difference in kind rather than degree. A prisoner serving a long sentence can still plan and dream. He has a reason to live. The very fact of having no possibility of

release transforms an endurable punishment into a life shattered beyond all hope.

Based on existing precedent, this Court can and should find that this sentencing scheme violates the Eighth Amendment prohibition on cruel and unusual punishment.

ARGUMENT

I. THE MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR POSSESSION OF OVER 650 GRAMS OF COCAINE WITHOUT CONSIDERING MITIGATING FACTORS SUCH AS NO PRIOR RECORD AND THE FACT THAT THE DEFENDANT WAS NOT A DRUG KINGPIN CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Petitioner Ronald Harmelin was convicted of possession of over 650 grams of a substance containing cocaine, in violation of MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to mandatory life imprisonment without possibility of parole.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *U.S. Const.*, Amend VIII; Mich. Const. 1963, Art.1, Sec.16. Petitioner contends that his sentence of life in prison for the possession of 650 grams of cocaine for a first-time offender without considering any factors or circumstances constitutes cruel and unusual punishment.

A. LEGISLATIVE INTENT OF STATUTE

In 1978, the Michigan legislature passed a bill increasing the penalties for possession of controlled substances. MCL 333.7403; MSA 14.15. Analyzers of the bill identified the problem that despite law enforcement and drug education personnel, there had been a steady increase in narcotics traffic and drug abuse in Michigan, with a corresponding increase in drug-related crime. Some persons claimed that the state had failed to stem drug traffic because the penalties for drug dealing were not severe enough and law enforcement tools were inadequate. They contended that the potential for profit was so great that Michigan's pre-1978 penalties of up to 20 years in prison posed little or no deterrent to would-be violators, with lenient probation and parole policies weakening the threat of imprisonment still further. Proponents of the bill argued that the law would have an important deterrent effect on drug trafficking. They argued that keeping drug dealers off the streets longer would help reduce illicit drug activity. They argued that this bill differed from similar statutes enacted in New York[2], because the Michigan bill was aimed specifically at higher echelon drug dealers.

Opponents of the bill asserted that major drug dealers, the intended targets of the legislation, would use addicts to transport large quantities of drugs rather than take the risk of facing long mandatory prison sentences

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[2] The New York statutes, which were criticized because they did not in reality reduce that state's drug problem, have since been revised. *See New York Penal Law* 220.43.

themselves. If this happened, the drug traffic would continue and only addicts, who were already victims of the drug scene, would be faced with long prison sentences. Opponents further argued that severe mandatory sentences were a simplistic approach to the complex problem of illicit drug activity. They argued that there was no real evidence that severe penalties would serve as a deterrent to crime. Opponents of the law argued that given the potential for profit, new dealers would quickly take the places of those sentenced to mandatory jail terms. Opponents argued that mandatory sentences undermined the modern concept of criminal justice, which endeavors to treat each individual separately and fairly. Lastly, the bill could put an intolerable burden on the state's courts and penal institutions. (Pet. App. see House Legislative Analysis March 23, 1977)[3]

Michigan now has 123[4] individuals serving mandatory life imprisonment without possibility of parole under this statute.

The Michigan Court of Appeals has affirmed the sentences of all the defendants who raised the Eighth Amendment issue. However, the courts are clearly troubled in these cases. The majority in *People v. Harding*, 163 Mich. App. 298, 329; 413 N.W.2d 777 (1987) stated, "We

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[3] Both proponents and opponents thought at the time that cocaine did not have the addictive effect of heroin.

[4] *Michigan Department of Corrections 1989 Annual Report* reports 101 prisoners under this law (17 for possession and 84 for delivery under MCL 333.7401). Another 22 people have been convicted under this law but are currently serving Federal time, after which they will become Michigan prisoners.

are constrained to follow precedent on this issue. The policy arguments presented by the defendants in support of their position are persuasive. We would invite a review by the highest court of the state as we would invite the Legislature to revisit this issue."

Not only has this issue caused conflict in the state appellate court system but also at the trial court level. In a candid opinion, Judge Norman L. Lippitt of the Oakland County Circuit Court disqualified himself from adjudicating a case similar to the one at bar. *People v. Martin, et al.*, #86-74706 (decided 8/20/87). Judge Lippitt stated:

> "Having carefully considered this statute, I have come to the conclusion that this law is the product of emotion, not reason. Politicians, known as legislators, in an effort to respond to community pressure and frustration over a very serious drug problem, rushed to a simple formula, in search of a solution – essentially "throwing away the key for life for any and all individuals who shall possess more than 650 grams of cocaine. However mindlessly throwing away the key will neither deter such crime, nor promote justice. Quite the opposite, bad laws, such as the one at issue here, promote disrespect . . .
>
> Every thinking person must know that there are many second degree murderers, rapists, kidnappers, and other violent offenders more dangerous to the public welfare than many people who possess over 650 grams of cocaine. Yet the law does not mandate a natural life sentence for each and every such violent criminal. Why then should it do so for the drug possessor? This is not to say that select drug possessors or dealers should not be sent away for natural life; it is

> simply to say that it makes no sense to mandate such a sentence for this offense and not to do so for many more dangerous offenders. This law has done nothing to ameliorate the bad conditions that exist in the State of Michigan with respect to the possession and distribution of illegal drugs. *Martin, supra,* at 3, 4.

The legislature has the power to define crimes and establish punishment. However, the exercise of that power is subject to judicial scrutiny to ensure that the punishment does not exceed constitutional limits. The judicial enforcement of the cruel and unusual punishment clause "cannot be evaded by invoking the obvious truth that the legislature has the power to prescribe punishments for crimes. That is precisely the reason the clause appears in the Bill of Rights." *Furman v. Georgia,* 408 U.S. 238, 268 (1972) (Brennan, J. concurring). More recently, this Court in *Solem v. Helm,* 463 U.S. 277 (1983) declared meritless the argument that the length of sentence was a legislative prerogative and, therefore, judicial review was precluded. *Solem,* at 288-9 n. 14.

The Michigan Supreme Court has denied leave to appeal in every case on this issue.

B. PROPORTIONALITY IN NON CAPITAL CASES

In 1980, this Court rejected the Eighth Amendment challenge of a Texas recidivist sentenced to life imprisonment in *Rummel v. Estelle,* 445 U.S. 263 (1980). Rummel was sentenced to life imprisonment for his third felony conviction. His three offenses were fraudulent use of a credit card, passing a forged check, and obtaining money

by false pretenses. He appealed, arguing that his sentence was grossly disproportionate to the three felonies that formed the predicate for his sentence.

The Court distinguished Rummel's sentence from those challenged in the death penalty cases, reasoning that the sentence of death differs in kind from any sentence of imprisonment, *Rummel, supra,* at 272. The Court did not preclude the possibility that the Eighth Amendment could be applied to a sentence of imprisonment, however:

> "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, Post, at 288, if a legislature made overtime parking a felony Punishable by life imprisonment. 445 U.S. at 274 n. 11.

The *Rummel* majority relied on the fact that the purpose of recidivist statutes is to deal in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society.

The Court reasoned that in order to qualify for a mandatory life sentence under the statute, Rummel had to satisfy a number of requirements. A felon must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released.

> "One in Rummel's position has been both graphically informed of the consequences of lawlessness and given the opportunity to reform, all to no avail. Art 63 thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of

> incarceration for life, subject only to the State's judgment as to whether to grant him parole." *Rummel, supra,* 445 U.S. at 278.

The Court also relied on the fact that Texas had a relatively liberal policy of granting "good time" credits to its prisoners, a policy that had historically allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. *Rummel,* 445 U.S. at 280. The Court said:

> "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." at 281.

A strong dissent in Rummel expressed the view that the penalty for a non-capital offense may be unconstitutionally disproportionate, and Rummel's sentence was grossly disproportionate to his offenses.

Justice Powell's position with respect to the legitimacy of the Court's proportionality review of non-capital cases was adopted by the majority in *Solem v. Helm,* 463 U.S. 277 (1983). Powell, joined by the dissenters in *Rummel, supra,*[5] and Justice Blackmun held that the defendant's sentence was significantly disproportionate to the crime, and was therefore prohibited by the Eighth Amendment.

Helm was sentenced to life imprisonment under South Dakota's recidivist statute following his seventh felony conviction, which was for issuing a "no account"

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[5] The dissenters include Justices Powell, Brennan, Marshall, and Stevens.

check for $100. His prior convictions were also for non-violent crimes and alcohol was a contributing factor in each. Helm's request for commutation, after serving two years, was denied by the Governor. The district court, relying on the authority of *Rummel,* denied his petition for habeas corpus relief. The circuit court reversed, noting that unlike Rummel, Helm had no possibility of parole.

The Supreme Court affirmed the circuit court's grant of habeas relief. Drawing primarily on its decision in *Weems v. United States,* 217 U.S. 349 (1910), but also on *Coker v. Georgia,* 433 U.S. 584 (1977) and *Enmund v. Florida,* 458 U.S. 782 (1982), this Court held that the constitutional proscription against cruel and unusual punishment prohibits sentences that are disproportionate to the crime committed. It held that no penalty is *per se* constitutional, so that proportionality applies to felony prison sentences as well as capital punishment. The court enumerated factors to be considered in a proportionality review: the gravity of the offense and the harshness of the penalty, sentences imposed on other criminals in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions.

The Court distinguished the *Rummel* decision by relying heavily on the fact that Rummel would be eligible for parole in 12 years, whereas Helm was sentenced to life with no parole.

C. SOLEM ANALYSIS

1. GRAVITY OF OFFENSE

The first criteria addressed by the Court in the *Solem v. Helm* proportionality analysis is the gravity of the offense. "There is no dispute that drug offenses are serious crimes. The issue in this case is not whether declaring war on drugs is good public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great." *Skinner v. Railway Labor Executives Association*, 489 U.S. ___, 103 L.Ed. 2d 639, 109 S. Ct. 1402 (1989) (Brennan, J., dissenting).

However, crimes of violence and danger to society such as murder, rape, and kidnapping have penalties tempered by discretionary and individualized sentencing.

Mr. Harmelin was convicted of possession of over 650 grams of cocaine and possession of a firearm in the commission of a felony. On April 30, 1987 he was sentenced to a mandatory life term of imprisonment with no possibility of parole. Because Michigan has no death penalty, his sentence is the harshest punishment that could be imposed by the state on any criminal for any crime. Mr. Harmelin will have to spend the rest of his life and die in a Michigan prison.

Not to take into account the facts of this particular offense or the history and characteristics of the petitioner is a great miscarriage of justice.

Mr. Harmelin was pulled over by the police for failure to make a complete stop at a red light. The police searched him and found some marijuana, a small amount of cocaine, a beeper, and a revolver, for which he had a valid permit. In the trunk of his car, they found 672 grams of cocaine and $2900 in a shaving kit.

We cannot, as the court did in *Enmund v. Florida*, 458 U.S. 782 (1982), examine the circumstances of the crime in great detail when examining the gravity of the offense. Mr. Harmelin did not take the stand at the trial, nor did he present any witnesses. The record contains no details to help a reviewing court discern the level of drug trafficking involved. Because the sentencing judge had no discretion to consider any sentence other than mandatory life imprisonment with no possibility of parole, the presentence report was not even mentioned at the sentencing hearing (J.A. see sentencing hearing). There was no evidence that the petitioner sold any drugs. There was nothing on the record to indicate that he was anything more than a "mule" of transport. There was certainly no evidence that Mr. Harmelin was a drug kingpin. He exhibited neither wealth nor the lifestyle typically associated with major drug figures. He owned a nine year old Ford automobile (J.A. presentence report). He owned nothing else. He admitted having a drug addiction. It is likely that he was working to support his own drug addiction.

Ironically, had this actually been a large-scale case it would have attracted the attention of the Federal Drug Enforcement Administration. Mr. Harmelin would have probably been brought to federal court where the same charges would have carried much lighter penalties, specifically, five to forty years. 21 U.S.C. 841(b).

The *Solem* court held that "Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices, 458 U.S. at 798. Most would agree that negligent conduct is less serious than intentional conduct." *Solem, supra.* 463 U.S. at 293.

The evidence showed that Mr. Harmelin had a handgun and a permit to carry it. There is no suggestion that Mr. Harmelin attempted to kill or assault anyone. To the contrary, when the police pulled him over, he immediately informed the officers that he had a gun so as to prevent an incident of violence. (Evidentiary Hearing of November 12, 1986, p. 11). This is far from the reckless disregard for human life noted in *Tison v. Arizona*, 481 U.S. 137 (1987). In that case, a prisoner who had been convicted of murdering a guard during a previous escape attempt was aided in a second attempt by members of his family, including his two sons, who smuggled guns into the prison and helped overpower the guards. After the getaway car developed a flat tire, the group decided to stop and steal a passing car. One of the sons flagged down some passing motorists, who were then held by the group at gunpoint, robbed of their valuables, and taken out into the desert. While the sons fetched some water, the prisoner and his cellmate fatally shot the captives. The shooters died of exposure in the desert and the sons were convicted of murder and sentenced to the death penalty.

The Arizona Supreme Court noted that Gary Tison could have anticipated lethal force because he knew that

his father's murder conviction arose out of a killing of a guard during an earlier prison escape attempt. Gary Tison said he would be willing to kill in a very close life or death situation. The Arizona court relied on the fact that Ricky Tison could have anticipated lethal force.

This Court upheld the statute, saying:

> "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." *Tison*, 481 U.S. at 156.

The Court continued:

> "We hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, one that may be taken into account in making a capital sentencing judgment when the conduct causes its natural, though not inevitable lethal result." *Tison*, 481 U.S. at 158.

Tison differs from the instant case in several ways. There is no evidence to suggest that Mr. Harmelin intended to kill anyone. This offense took place in 1986. Since then an explosive increase in crack cocaine use has resulted in a heightened awareness of the dangers of cocaine. At the time Mr. Harmelin was arrested, cocaine did not have the reputation that it now has acquired. Experts at the time contended that cocaine was not addictive. Indeed, it was scheduled as a non-narcotic in Michigan at the time this law took effect. Nor is death the natural and inevitable consequence of cocaine.

Secondly, by his roadside actions, Mr. Harmelin demonstrated a high regard for human safety in announcing to the police officers that he had a weapon.

Finally, no one was killed.

American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical "to the degree of his criminal culpability." *Cabana v. Bullock*, 474 U.S. 376 (1986), (dissent by Stevens, J., joined by Brennan, J.) citing *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

The judge in the instant case was not allowed by the statute to consider that the defendant had absolutely no criminal record, that he had not displayed any viciousness, and that he did not demonstrate an inability to reform.

The government would argue that cocaine is a dangerous drug and those who sell it must realize that they are endangering human lives. But many more (hundreds of thousands) of people in this country die from tobacco and alcohol each year, and the sellers and manufacturers also must realize that death can occur. Does this mean that they intend to kill? Are they morally culpable? Surely a person who commits nonconsensual, violent crimes is more morally culpable than the petitioner in the instant case.

Agents of the federal government recently provided cocaine to Mayor Marion Barry. Can it be said that their intent was to cause his death?

2. ANALOGY TO DEATH PENALTY CASES

The Michigan statute at issue in this case provides for apenalty of life imprisonment with no possibility of parole. Petitioner submits that a mandatory sentence of life imprisonment with no possibility of parole is the equivalent or nearly the equivalent of a mandatory death penalty.

In a series of cases beginning with *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases, *Woodson v. North California*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976), this Court has established a constitutional doctrine of individualized sentencing in capital cases. This doctrine requires that the sentencer must consider any relevant mitigating circumstances of the offense and the offender before imposing the death penalty. *See Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (plurality opinion) (sentencer must not be precluded from considering any aspect of defendant's character or record and any circumstances of the offense)[6], *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (*Lockett* adopted by majority; sentencer may not refuse to consider as a matter of law any relevant mitigating evidence); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (exclusion of testimony regarding defendant's good behavior while in jail awaiting trial violated *Lockett* and *Eddings*); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (unanimous opinion) (jury was improperly instructed and judge

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[6] The Court in *Lockett* expressly left open the application of *Lockett* to mandatory minimum sentences in noncapital cases. 438 U.S. at 605, n. 13.

improperly refused to consider mitigating circumstances not listed in statute); *Penry v. Lynaugh*, 492 U.S. ___, 109 S. Ct. 2934, 2947-2952 (1989) (defendant entitled to jury instruction so that jury could give effect to his mitigating evidence).

Society distinguishes between those who acted with and those who acted without a purpose to destroy life. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the defendant was convicted of aggravated murder because she had helped plan an armed robbery and was outside in the car when the pawn shop owner was killed. The Ohio death penalty statute required the trial judge to impose a death sentence unless, after considering the nature and circumstances of the offense and the defendant's history, character, and condition, he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she was under duress, coercion, or strong provocation, or (3) the offense was primarily the product of psychosis or mental deficiency. Ohio Rev. Code § 2929.03-2929.04(B)(1975).

The presentence reports showed that Lockett had a record of several minor offenses, a prior heroin addiction, and no mental deficiency. Her prognosis for rehabilitation was favorable.

After considering the reports and hearing arguments, the judge sentenced Lockett to death. This Court, in a plurality opinion written by Justice Burger, reversed the death penalty. The Court held that the concept of individualized sentencing in criminal cases has long been

accepted in this country. The definition of crimes generally has not been thought automatically to dictate what should be the proper penalty. The Court held that to meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

In a concurring opinion, Justice Blackmun stated,

> "I have been unwilling to interfere with the legislative judgment of the States in regard to capital-sentencing procedures . . . but the unusual degree to which Ohio requires capital punishment of a mere aider and abettor in an armed felony resulting in a fatality even where no participant specifically intended the fatal use of a weapon, provides a significant occasion for setting some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life. 438 U.S. at 997.

Justice Marshall explored the notion of individual criminal culpability in his concurring opinion.

> "Permitting imposition of the death penalty solely on proof of felony-murder necessarily leads to the kind of "lightning bolt", "freakish" and "wanton" executions that persuaded other Members of the Court to join Justice Brennan and myself in *Furman v. Georgia*, holding Georgia's death penalty statute unconstitutional. That the Ohio trial court could impose the death penalty on petitioner under these facts and that the Ohio Supreme Court on review could sustain it, cast strong doubt on the plurality's premise that appellate review in state systems is sufficient to avoid the wrongful and unfair imposition of this irrevocable penalty." 438 U.S. at 622.

In a concurring opinion, Justice White distinguished degrees of criminal culpability. He said, "This is not to question, of course, that those who engage in serious criminal conduct which poses a substantial risk of violence deserve serious punishment. But society distinguishes between the culpability of those who acted with and those who acted without a purpose to destroy human life." 438 U.S. at 626.

Mandatory death penalty statutes of all types, no matter how narrowly drawn, have been struck down by this Court as violative of the Eighth Amendment. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987).

Although the instant case involves life imprisonment without parole rather than capital punishment, the rationale is applicable in both contexts. Like the death penalty, mandatory life imprisonment *without parole* "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty . . . " *Woodson, supra*, 428 U.S. at 304. Indeed, a number of the factors used by this Court in *Lockett* to distinguish capital and non-capital cases – e.g. the availability of probation, parole, work furloughs – are also unavailable under Michigan's life without parole statute. *Lockett supra*, at 605. Thus, this Court's capital sentencing decisions should be applied in determining the constitutionality of the instant statute. *See United States v. Perez*, 685 F. Supp. 990, 1002 (W.D. Tex. 1988), *cert. denied*, 110 S. Ct. 1153 (1989), a pre-*Mistretta* Sentencing Guidelines case wherein Judge Nowlin states:

> "The Court also finds guidance in Supreme Court decisions which mandate that a sentencing judge or jury cannot be restricted from considering all relevant mitigating circumstances when the death penalty is a possibility. [citing *Lockett, Skipper,* and *Hitchcock*] Some distinctions may be appropriate between procedures for capital and noncapital cases because the sentences differ in kind. The Court is of the opinion, however, that the defendant's ability to inform the Court of circumstances and factors unique to him and the Court's ability to consider such factors should not be determined by whether the defendant faces a maximum punishment of death, a life sentence, or a lesser term of incarceration."

In *Woodson v. North Carolina, supra,* this Court struck down a North Carolina statute which provided for a mandatory death penalty for all persons convicted of first degree murder. The Court quoted with approval Justice Black's statement of twenty-seven years earlier that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Woodson, supra,* 428 U.S. at 296-297 (quoting *Williams v. New York,* 337 U.S. 241, 247 (1949).

In *Roberts (Stanislaus) v. Louisiana, supra,* decided the same day as *Woodson,* a provision of the Louisiana mandatory death penalty statute defined first degree murder more narrowly than the North Carolina statute and provided for automatic jury instructions on lesser included offenses. The Court did not find these differences to be of constitutional significance and again struck down the mandatory death penalty statute, finding the "constitutional vice" of such statutes to be the "lack of focus on the

circumstances of the particular offense and the character and propensities of the offender." 428 U.S. at 333.

In *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977), the Court addressed a mandatory death penalty provision which was even more narrowly drawn. A different Louisiana provision from that in *Stanislaus Roberts* provided for mandatory death if the murder victim was a police officer performing his lawful duties. Nevertheless, the Court struck down the provision as an unconstitutional mandatory statute. 431 U.S. at 636-637.

In 1987, the Court addressed the question which had been expressly left open in previous cases, *see Woodson* 428 U.S. at 287 n. 7; *Stanislaus Roberts*, 428 U.S. at 334, n. 9; *Harry Roberts*, 431 U.S. at 637 n. 5: whether the Eighth Amendment prohibits a statute which provides for a mandatory death penalty as to a prison inmate who murders while serving a sentence of life imprisonment without parole. *Sumner v. Shuman*, 483 U.S. 66 (1987). The *Sumner* Court, after providing a comprehensive summary of this Court's cases comprising the "individualized capital-sentencing doctrine," 107 S. Ct. at 2721-2723, found that even under these extreme circumstances, the Eighth Amendment did not permit a departure from the requirement of individualized sentencing.

This Court has struck as cruel and unusual every statute which has provided for a *mandatory* death penalty. *Blystone v. Pennsylvania*, 494 U.S. ___, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990), and *Boyde v. California*, 494 U.S. ___, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), are not to the contrary. In *Blystone*, the Court upheld a statute which provided that if a jury finds at least one aggravating

circumstance and finds no mitigating circumstances, then it must impose the death penalty. Similarly, in *Boyde* the Court upheld a statute which provided that if a jury finds that the aggravating circumstances outweigh the mitigating circumstances, then it must impose the death penalty. Unlike the statutes in *Woodson* and its progeny, and the Michigan statute in the instant case, the Pennsylvania and California statutes allowed the sentencer to consider any mitigating circumstances and therefore were not impermissibly mandatory.

The reasoning in the Court's capital cases applies as well to the Michigan statute providing for mandatory life imprisonment without parole for possession of 650 grams of a mixture containing cocaine. The unique nature of the penalty of life imprisonment *without possibility of parole* is underscored by this Court's decision in *Solem v. Helm*, *supra*. This Court found that "Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system." *Helm*, *supra*, 463 U.S. at 283-284, citing *Helm v. Solem*, 684 F. 2d 582 (8th Cir. 1982).

The Michigan statute mandating life without parole for a narcotics offense suffers from the same infirmities as the mandatory statutes in *Woodson*, the *Roberts* cases, and *Sumner*, *supra*. These statutes could not withstand Eighth Amendment scrutiny because they did not permit individualized consideration of the offender and the offense. *See Lockett*, *Eddings*, and their progeny, *supra*.[7]

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[7] The Judicial Conference of the United States recently submitted a resolution to the United States Congress urging

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3. EVOLVING STANDARDS OF DECENCY

This Court early recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 U.S. 349, 373 (1910). Thus the Clause forbidding "cruel and unusual punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 378. *See also Furman v. Georgia; Trop v. Dulles*, 356 U.S. 86 (1958); *Gregg v. Georgia*. As Chief Justice Warren said, in an oft-quoted phrase, "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra*.

In *United States v. McCann*, 835 F. 2d 1184 (6th Cir. 1984), the U.S. Court of Appeals for the Sixth Circuit applied the *Solem v. Helm* analysis to the case of a Michigan defendant convicted under a federal statute. Defendant McCann pled guilty to several drug related charges including a charge of conducting a continuing criminal enterprise in violation of 21 U.S.C. 848. Defendant

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Congress to reconsider the wisdom of statutory mandatory minimum sentences. *Report of the Proceedings of the Judicial Conference of the United States*, p. 16 (Washington, D.C., March 13, 1990). In doing so, the Conference followed resolutions submitted by judges of the Third, Eighth, Ninth, and Tenth Circuits, reprinted in 135 Cong. Rec. *12703-12704 (daily ed. Oct. 5, 1989). In addition, the Federal Courts Study Committee, consisting of fifteen members appointed by the Chief Justice, recently issued its final report recommending repeal of statutory mandatory minimum sentencing provisions. 47 Crim. L. Rep. (BNA) 1057-1059.

received a sentence of life imprisonment without parole as provided by statute. On appeal the defendant contended that his sentence was so disproportionate to his crime that it was violative of the Eighth Amendment.

The Sixth Circuit acknowledged the deference that ought to be given to legislatures and sentencing courts but decided that an extended proportionality analysis was appropriate in *McCann* because like *Solem v. Helm*, it involved a sentence of life without parole, "a fact which on its own is perhaps enough to trigger an extended proportionality analysis." *McCann, supra* at 1188. After reviewing the facts, the Sixth Circuit confirmed that defendant McCann's drug enterprise was extensive and lucrative. Defendant, along with his codefendant, was responsible for hundreds of kilograms of cocaine importation. The drug operation involved several Latin American countries, and a substantial number of people. Defendant was not a mere "logistics man" but recruited people and supervised the activities of the operation. Furthermore, defendant was a lawyer and had been a successful business person prior to his drug involvement.

Applying the test in *Solem*, the Sixth Circuit Court of appeals found without question that the sentence of life without parole was extremely harsh. However, defendant McCann's crime was also great, involving a large, continuing enterprise in drugs and profits. Further, in comparing the *McCann* life sentence to other sentences imposed by federal courts for convictions of a continuing criminal enterprise, the Sixth Circuit found no significant disparity.

Finally, the Sixth Circuit noted that if defendant McCann had been tried under state jurisdiction in Michigan, he also would have received a mandatory life sentence without parole. The court stated "McCann could have received a mandatory life sentence in Michigan for activities substantially less blameworthy than the hundreds of kilograms of cocaine he was actually responsible for." *McCann, supra* at 1190. The Sixth Circuit affirmed his conviction.

Unlike McCann, Mr. Harmelin did not import hundreds of kilograms of cocaine. There is no evidence that he was a major player in any drug enterprise. His financial resources were meager. All indications are that he, like so many other defendants in Michigan caught in this law, was merely a mule of transport.

Unlike the defendant in *Helm*, Mr. Harmelin was not a recidivist. He had not had seven chances at rehabilitation. He had not proved to be incorrigible.

It is true that there is a huge amount of public pressure on our politicians to solve the drug problem. The Michigan Supreme Court, in its refusal to hear the issue, succumbs to the popular pressures described by Oliver Wendell Holmes in his first dissenting opinion as a member of the United States Supreme Court:

> "Great law, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously seemed clear

> seem doubtful, and before which even well settled principles of the law will bend." *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401, 48 L. Ed. 679, 24 S. Ct. 436 (1904).

In his dissenting opinion in *National Treasury Employees Union v. Von Raab*, 489 U.S. ___, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989), Justice Scalia voiced a similar sentiment regarding the implementation of a drug screening program for Customs officials. Justice Scalia criticized the Court for approving drug testing apparently because they believe that implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security. Justice Scalia said this law was designed to:

> "demonstrate the determination of the Government to eliminate this scourge of our society. I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Id.* at 1401.

Justice Scalia quoted the famous Brandeis dissent in *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, at 572, 72 L. Ed. 944 (1928):

> "It is immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in

insidious encroachment by men of zeal, well-meaning but without understanding."

4. HARSHNESS OF PENALTY

Mr. Harmelin was sentenced to mandatory life imprisonment with no possibility of parole. He will die in prison.

There is an enormous difference between a lengthy sentence and a sentence of mandatory life with no possibility of parole. It is a difference in kind rather than degree. A prisoner serving a long sentence, even a sentence that looms into the twilight years of his life, can still keep his dreams alive. He can imagine, as he lays down in his cell at night, what he will do when he is finally paroled. He can plan what good things he can do to make up for the wrongs he has committed. He can dream of the things he can do to perhaps make this world a better place for everyone. He can dream of his loved ones, and how, once he is reunited with them, he will be able to spend hours with them, making up for lost time. He has a reason to obey the prison laws. He has a reason to act like a human being. He has a reason for living. His soul is alive. The very fact of having no possibility of release transforms an endurable punishment into a life shattered beyond all hope.

To take away everything that people hope and dream for in their lives, the big things and the little things, forever, with no hope of redemption, is a most profoundly harsh thing for a Government to do to one of its citizens. Such a punishment may well be appropriate

recompense for the most vicious of cruelties. But, what about a nonvicious person who makes a mistake in judgment?

Given the honored place of liberty in the constitution, harsh prison sentences imposed without the prospect of parole raise their own problems of enormity, irrevocability, and finality, as well as the need for procedural reliability and regularity. As Justice Clark once questioned in the context of procedural due process safeguards, "how can the Fourteenth Amendment tolerate a procedure which it condemns in the capital cases on the ground that deprival of liberty may be less onerous than deprival of life – a value judgment not universally accepted – or that only the latter deprivation is irrevocable? *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963)(Clark, J., concurring in the result).

Petitioner is aware that the Michigan Court of Appeals has rejected the claim of cruel and unusual punishment, and the Michigan Supreme Court has not decided the issue. Petitioner submits that a hundred or even a thousand such judicial decisions could not make right that which is so clearly wrong. Judges in Salem, Massachusetts, undoubtly approved the burning of witches at the stake, but their approval could not make it right. Our descendants will look back on this peculiar period of our history with horror and shame, much as we now look back on our ancestors' practice of setting fire to eccentric old women for the good of the community.

This Court has long held that the imposition of death by public authority is profoundly different from all other

penalties. This premise rests in part on reasoning inapplicable here. In *Lockett, supra,* the Court reasoned, "the need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few – and various postconviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailabilty of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." *Lockett,* at 438 U.S. 605.

In the instant case, the "flexibility" this Court has previously attributed to prison sentences does not exist. Petitioner must spend the rest of his life in prison, period.

This Court has oft stated the opinion that the penalty of death is qualitatively different from a sentence of imprisonment, however long and that death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. *Woodson v. North Carolina,* 428 U.S. 280 (1976).

Anyone who has paused to consider the issue must realize that a sentence that provides no hope of release is qualitatively different than one that does. Without action from this Court, petitioner can never regain his liberty.

From a practical point of view the economics of housing petitioner and other similarly situated prisoners is alarming. The cost of housing inmates into old age and

until they die is a needless draw on admittedly scarce resources.

The Michigan law was enacted to punish drug kingpins. In its zeal to clean up the drug problem, Michigan has enacted a law that has resulted in exactly the kind of "lightning bolt", "freakish" and "wanton" results which persuaded this Court to strike down the death penalty statute in *Furman v. Georgia, supra.*

5. SENTENCES FOR OTHER CRIMES IN MICHIGAN

The second criteria in the *Solem v. Helm* proportionality analysis is to compare sentences for other crimes in the same jurisdiction to see whether more serious crimes are subject to the same penalty or to less serious penalties. A punishment, otherwise appropriate, may be so disproportionate to the offense charged as to be cruel and/or unusual.

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California,* 370 U.S. 660, 667 (1962).

The Michigan statute in the instant case imposes a mandatory life penalty with no possibility of parole for possession of 650 grams or more of a mixture containing cocaine. The statute is equally applicable to a first-time offender as it is to an habitual criminal.

By comparison, only possession of 650 grams or more of a controlled substance and the commission of first-degree murder, MCL 750.316; MSA 28.548, are subject to mandatory life sentences. In contrast, second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, MCL 750.83; MSA 28.278, first-degree criminal sexual conduct, MCL 750.520(b); MSA 28.788(2), armed robbery, MCL 750.529; MSA 28.797, assault with intent to rob while armed, MCL 750.89; MSA 28.284, bank robbery, MCL 750.531; MSA 28.799, kidnapping, MCL 750.349; MSA 28.581, taking of hostages by penal inmates, MCL 750.349(a); MSA 28.581(1), and fourth habitual felon, MCL 769.12; MSA 28.1084, carry terms of "life or any term of years."

In each of the foregoing offenses, the legislature has allowed the courts to exercise discretion in sentencing. None of these life offenses mandates imposition of a sentence of life imprisonment. None precludes the possibility of parole.

While the instant offense carries a mandatory life sentence with no parole, the maximum sentences for the following crimes in Michigan are enlightening: assault with a dangerous weapon, four years, MCL 750.82, 750.503; MSA 28.277, 28.771, assault with intent to maim, ten years, MCL 750.86; MSA 28.281, assault with intent to do great bodily harm less than murder, ten years, MCL 750.84; MSA 28.279.

A person with a long criminal record could commit the foulest atrocities, such as holding people captive for years as sexual slaves, hacking off limbs, or poking out

eyes of children, or attempting to assassinate public officials, without even the *possibility* of receiving a sentence as high as petitioner. In contrast, Mr. Harmelin had to receive a sentence of life without parole regardless of how the judge evaluated his character. The judge was compelled by statute to ignore the fact that Mr. Harmelin had absolutely no criminal record, that his offense was non-violent, that he harmed no one, that he did not display viciousness, that he did not demonstrate an inability to reform.

If the substance in Mr. Harmelin's trunk had turned out to be over 650 grams of cyanide, enough to kill hundreds of thousands of innocent people, he would have gone completely unpunished. Even if the police found with the cyanide a note in the petitioner's handwriting outlining a plot to use the cyanide to poison municipal water supplies, he still could not be punished as harshly as he has been for possessing cocaine.

In Michigan, the following scenerio could occur. A twenty-year old man could become enraged and shoot and kill his victim. If convicted of second-degree murder, he could be sentenced under the Michigan sentencing guidelines to as little as eight years. If he successfully completed parole, and murdered another victim, intentionally but not with premeditation, he could then be sentenced to as little as ten years. Now paroled at age forty, if he committed a third unpremeditated murder, he could still be sentenced to as low as fifteen years. Which person presents the greater threat to society?

If Mr. Harmelin had pulled out his gun and shot the officers to death, would we not think worse of him than

we do now? Why is that? It is because our feelings about the sanctity of human life require that we assign the intentional taking of life our highest level of condemnation, and that other crimes, however disapproved, simply cannot be considered to rise to that level of evil.

Michigan has a habitual felon statute which provides for a sentence of up to life imprisonment for a fourth felony conviction. MCL 769.12; MSA 28.1084. Michigan also has a drug recidivist statute which provides for enhanced penalties of up to twice the maximum penalty of the underlying crime. MCL 333.7413; MSA 14.15(7413). Both these statutes are available to punish those individuals who have shown by their behavior that they cannot conform to societal standards.

This Court has held that the Eighth Amendment requires individualized sentencing in capital cases. Jury discretion should be channeled to avoid arbitrary and capricious capital sentencing. *Furman v. Georgia*, 408 U.S. 238 (1972). A capital jury should be allowed to consider all relevant mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586 (1978). The use of aggravating and mitigating factors is a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. *Blystone v. Pennsylvania*, 110 S. Ct. 1078, 1083 (1990). This Court found that the constitutional defect in *Furman* was that unguided juries were imposing the death penalty in an inconsistent and random manner on defendants, and that provisions that suitably direct and limit a sentencing jury's discretion are necessary "so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Under these circumstances, the

death penalty statute was found to pass constitutional muster.

It is also constitutionally imperative that the jury be allowed to consider mitigating evidence. The mandatory death penalty in *Woodson v. North Carolina*, 428 U.S. 280 (1976) was held invalid because it permitted no consideration of relevant factors of the character and record of the individual offender or the circumstances of the particular offense.

In the recent case of *Blystone v. Pennsylvania*, 494 U.S. ___, 110 S. Ct. 1078 (1990) upholding a Pennsylvania death penalty statute, this Court emphasized the importance of the opportunity for the sentencing jury to consider and give effect to all relevant mitigating evidence. Since the Pennsylvania statute did not limit the types of mitigating evidence which may be considered, by including the circumstances of the crime and the background of the defendant, the Court found the statute did not violate the Eighth Amendment. The Court also noted that the death penalty was not automatically imposed upon conviction for certain types of murder. It was imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances. *Blystone, supra* at 1082.

In Michigan, only conviction of possession of over 650 grams of a controlled substance and first degree murder mandate a sentence of life imprisonment with no possibility of parole. The class of defendants eligible for mandatory life for murder is narrowed by the elements of

first degree murder in Michigan. A jury receives the following instruction from the judge in a first-degree murder case: The government must prove beyond a reasonable doubt that the defendant intended to kill the victim, that the intent to kill was premeditated, that the killing was deliberate. Deliberate means that the defendant must have considered the pros and cons of that design and have measured and chosen his actions. The intent must be formed by a mind that is free from undue excitement. This excludes acts done on a sudden impulse without reflection [or as a result of a sudden fight]; and, that the killing was the result of real and substantial reflection. There must be such a lapse of time as would give the mind time to think about the purpose and intent of the killing. The law does not specify the length of that period, and it will vary with individuals and circumstances. The test is not the duration of time but the extent of the reflection. There must be sufficient time to afford a reasonable man time to subject his actions to a second look. *See Michigan Criminal Jury Instructions 16:2:01.*

Thus Michigan's sentencing scheme for first degree murder applies only to the most culpable murderers – those who murder in cold blood. Only they are sentenced to mandatory life in prison with no parole. Only those guilty of first-degree murder are considered so morally depraved as to have lost their right to live in society forever. Only those guilty of first-degree murder are considered to be beyond rehabilitation. The circumstances of the offense narrow the penalty from all murderers to those who are the most morally reprehensible.

By contrast, for the offense of possession of over 650 grams of cocaine, the government must only prove that

the defendant knowingly possessed over 650 grams of a substance containing cocaine. No proof is required that the defendant had an intention to kill. No proof is required that the defendant even had a reckless disregard for human life. No proof is needed that a death occurred as a result of the defendant's actions.

Significantly, in order to provide a bed for Mr. Harmelin for the rest of his natural life, other more violent offenders, such as rapists, armed robbers and second degree murderers will be released.

Perhaps one of the most surprising things the casual observer immediately notices is that a purity or concentration is not mentioned. The developed case law has held that it does not matter. *People v. Campbell,* 115 Mich. App. 369; 320 N.W.2d 381 (1982); *People v. Ward,* 133 Mich. App. 344; 351 N.W.2d 208 (1984). Whether the cocaine is 1% pure or 100% pure is of no consequence as long as the weight is over 650 grams. Practically speaking, the difference is tremendous. Assume defendant A has 6.5 grams of pure heroin. If arrested and convicted at that point, he faces a minimum sentence of probation and a maximum of 4 years. If defendant A is arrested an hour later after having cut and diluted the 6.5 grams of pure heroin down to 1% purity, he then, if convicted, faces life without parole. The inequity is apparent.

It seems equally unfair that it is not necessary that the government prove that the defendant knew personally that the amount of drugs he possessed was at least 650 grams. *People v. Cortez,* 131 Mich. App. 316; 346 N.W.2d 540 (1984).

Additionally, the law would allow a person to be convicted of the offense even if he is in constructive or joint possession with a number of other persons. Or a person could be convicted on the aiding and abetting theory. *People v. Harding*, 163 Mich. App. 298; 413 N.W.2d 777 (1987). This, too, would and has allowed a number of people to be convicted for possessing the same substance and receiving the mandatory sentence.

6. SENTENCES FOR DRUG CRIMES IN OTHER STATES

A third criteria under the proportionality test set forth in *Solem v. Helm, supra*, is a comparison of the sentence imposed for commission of the same crime in other jurisdictions. In *Helm*, this Court examined the sentences Helm could have received in other states and noted that only one other state, Nevada, allowed the imposition of a sentence of life without parole for a seventh habitual criminal.

Michigan is the only state in the country which mandates a sentence of life imprisonment with no possibility of parole for the possession of 650 grams of cocaine. Only one other state, Alabama, has a similar mandatory sentence of life imprisonment with no parole and that is for the crime of possession of over ten kilograms of cocaine. (Pet. App. chart of drug penalties in other states) If Mr. Harmelin had been convicted in Alabama, he would have been subject to a five year mandatory minimum term of imprisonment for the offense of possession of from 500 grams to one kilogram of cocaine. For one kilogram to ten kilograms, Alabama mandates a minimum of fifteen

years. Only possession of over ten kilograms of cocaine is punished by mandatory life imprisonment in Alabama.

Eleven states provide a possible sentence of up to life imprisonment for Mr. Harmelin's offense. All of these states, however, provide for parole: Connecticut after the defendant serves the minimum sentence; Idaho, parole after ten years; Kansas, parole after fifteen years; Missouri, parole after five years; Montana, mitigating factors considered at sentencing; Nevada, parole after serving minimum; New York, parole after serving minimum; North Dakota, parole after thirty years less sentence reduction for good time credits; Oklahoma, sentence can be suspended for first time offenders; Rhode Island, departure from minimum allowed for substantial and compelling reasons; Tennessee, parole after nineteen years; and Texas, parole after twenty years.[8]

Parolability was a factor deemed crucial in this Court's decision in *Solem v. Helm, supra*. It was precisely the possibility of parole which distinguished this Court's decision in *Rummel v. Estelle, supra*, from *Solem v. Helm*.

The dissent in *Solem* was based on reasoning not applicable here. The dissent felt that the differences between the sentences of Rummel and Helm were insubstantial:

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[8] Many of these inmates may be released earlier because of good time credit which we were unable to discern. Without action by this Court, Mr. Harmelin will spend his entire life behind bars. The present governor of Michigan, in office since 1983, has pardoned one convicted murderer and no drug prisoners. Given the climate of hysteria over the war on drugs, it is reasonable to assume that no elected official would risk taking this action, no matter how right the cause.

"The Court's opinion necessarily reduces to the proposition that a sentence of life imprisonment with the possibility of commutation, but without possibility of parole, is so much more severe than a life sentence with the possibility of parole that one is excessive while the other is not. This distinction does not withstand scrutiny; a well-behaved "lifer" in respondent's position is most unlikely to serve life." 316 U.S. at 463.

The dissent continued:

"In short, there is a significant probability that respondent [Helm] will experience what so many "lifers" experience. Even assuming that at the time of sentencing respondent was likely to spend more time in prison than Rummel, that marginal difference is surely supported by respondent's greater propensity for crime-and for more serious crime at that."

* * *

"It is indeed a curious business for this Court to so far intrude into the administration of criminal justice to say that a state legislature is barred by the Constitution from identifying its habitual criminals and removing them from the streets. Surely seven felony convictions warrant the conclusion that respondent is incorrigible." 316 U.S. at 317.

Petitioner does not contest the dissent's opinion that this court should not be required to apply the porportionality test in cases where a state has identified a criminal offender whose record shows he is a chronic recidivist who will not abide by the law.

Petitioner does not argue with the fact that in general "legislatures are far better equipped than we are to balance the competing penal and public interests and to

draw the essentially arbitrary lines between appropriate sentences for different crimes." *Solem v. Helm*, at 314.

But in the present climate of the war on drugs, few politicians seem willing to risk the potential backlash of appearing soft on drug crimes. A higher authority, a Court which is above transient political pressure, which can decide issues through reason and not emotion, must be pressed into action.

7. SENTENCING UNDER FEDERAL LAW

No other jurisdiction in the United States has penalties even coming close to the harshness of Michigan's. Indeed, under federal law, if a first offender possessed the same amount of cocaine as did Mr. Harmelin, the maximum penalty would be a term of not less than five or more than forty years in prison. 21 U.S.C. Sec. 841 (b)(1)(B)(ii). Mr. Harmelin would have received a significantly lighter sentence than he did under state law, even under the "toughened" Sentencing Guidelines which are in effect today. Under the *United States Sentencing Commission Guidelines* Mr. Harmelin's base level is 26 which provides for a 63 to 78 month sentence. If, however, the sentencing court considered Petitioner an organizer, leader, manager or supervisor of a drug operation the sentence could have been enhanced to levels which provide for a 78 to 97 months sentence. It should be noted that Mr. Harmelin was carrying a firearm. He had a valid permit to carry the gun. If, however, one wished to enhance his sentence by arguing that a firearm was used

in the commission of the offense, and couple this enhancement with the organizer provision, the maximum sentence under the guidelines would still be only 97 to 121 months. Thus, under the worst case scenerio Mr. Harmelin's sentence in federal court would be between 97 and 121 months. *See United States Sentencing Commission Guidelines* Section 2d1.1. (November 1987) (November 1, 1989 Amendments to Guidelines).

Under federal law the only possibility of a mandatory minimum of life without parole is under Title 21 U.S.C. Sec. 848, the Continuing Criminal Enterprise Statute (often referred to as the drug kingpin statute). In order to convict an individual under this statute, a person has to be an organizer, supervisor, or manager of five or more people; commit a continuing series of violations; derive substantial resources from the activities; and the organization must have grossed at least ten million dollars per year, or alternatively, distributed 150 kilograms of cocaine. Absent a conviction under the Continuing Criminal Enterprise Statute, the only time a person can receive a sentence of life imprisonment is if aggravating factors resulting in death or serious bodily injury are present.

Finally, it must be remembered that in the federal system, under Rule 35 of the Federal Rules of Criminal Procedure the government may move for a reduction of defendant's sentence to a term under the mandatory minimum of the Sentencing Guidelines if defendant has provided substantial cooperation or assistance to the government. Michigan has no such provision.

Based of the foregoing data it is clear that Michigan's penalty for possessing 650 grams or more of a substance containing cocaine is by far the harshest in the country. It is so far out of step with both the federal law and the laws of other states, that it fails to conform with evolving standards of decency and the Eighth Amendment.

CONCLUSION

For the foregoing reasons, this Court should hold that the Michigan sentencing statute in this case is unconstitutional.

Respectfully submitted,

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MCL 333.7403. Possession of controlled dangerous substance; penalties

Sec. 7403. (1) A person shall not knowingly or intentionally possess a controlled substance or an official prescription form or a prescription form unless the controlled substance, official prescription form, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv),[1] and:

(i) Which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life.

(ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

(iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for not less than 10 years nor more than 20 years.

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[1] Section 333.7214(a)(iv).

(iv) Which is in an amount of 25 grams or more, but less than 50 grams of any mixture containing that controlled substance is guilty of a felony, and shall be imprisoned for not less than 1 year and not more than 4 years, and may be fined not more than $25,000.00 or placed on probation for life.

(v) Which is in an amount less than 25 grams of any mixture containing that controlled substance is guilty of a felony, punishable by imprisonment for not more than 4 years or a fine of not more than $25,000.00, or both.

(b) A controlled substance classified in schedule 1, 2, 3, or 4, except a controlled substance classified in schedule 1 for which a penalty is prescribed in subdivision (a), (c), or (d), is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.

(c) Lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(d) Marihuana, is guilty of misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(e) An official prescription form, is guilty of a felony, punishable by imprisonment for not more than 1 year, or a fine of not more than $2,000.00, or both.

(f) A prescription form other than an official prescription form, is guilty of a misdemeanor, punishable by

imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(3) The court may depart from the minimum term of imprisonment authorized under subsection (2)(ii), (iii), or (iv) if the court finds on the record that there are substantial and compelling reasons to do so.

Amended by P.A. 1988, No. 47, § 1, Eff. March 30; P.A. 1988, No. 60, § 1. Eff. Aug. 1, 1989; P.A. 1989, No. 143, § 1, Eff. Sept. 28.

MCL 333.7214. Schedule 2; substances included

Sec. 7214. The following controlled substances are included in schedule 2:

(a) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(iv) Coca leaves and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances do not include decocainized coca leaves or extraction of coca leaves which extractions do not contain cocaine or ecgonine. The substances include cocaine, its salts, stereoisomers, and salts of stereoisomers when the existence of the salts, stereoisomers, and salts of stereoisomers is possible within the specific chemical designation.

LAW LIBRARY

HOUSE BILL 4190 (as passed by the House)
Sponsor: Rep. Paul Rosenbaum
House Committee: Judiciary
Senate Committee: Judiciary

THE APPARENT PROBLEM:

Despite the efforts of law enforcement and drug education personnel, there has been a steady increase in narcotics traffic and drug abuse in Michigan, with a corresponding increase in drug-related crime. Some persons claim that the state has failed to stem drug traffic because the penalties for drug dealing are not severe enough, and law enforcement tools are inadequate. They contend that the potential for profit in drug dealing is so great that Michigan's present penalties pose little or no deterrent to would be violators, with lenient probation and parole policies weakening the threat of imprisonment still further. Police officers involved in narcotics investigation also complain that they are arresting the same persons over and over because convicted drug dealers are quickly returned to the illicit drug scene through probation and parole. Further, it is claimed that the top drug dealers are so far removed from the "street scene" that only increased investigatory powers including wiretapping can result in their apprehension and conviction.

THE CONTENT OF THE BILL:

The bill would change the penalties in the Controlled Substance Act of 1971 for the illegal possession or sale and delivery of Schedule 1 or 2 narcotic drugs (opium

and its derivatives, including heroin) and cocaine, as follows:

ILLEGAL MANUFACTURE, DELIVERY, OR POSSESSION OVER 50 GRAMS (1¾ ounces) OF ANY MIXTURE CONTAINING THESE SUBSTANCES

650 grams or more (23 oz. or more) – mandatory life imprisonment

225 to 649.99 grams (8 to 23 oz.) – mandatory 20 to 30 years imprisonment

50 to 224.99 grams (1¾ to 8 oz.) – either mandatory 10 to 20 years imprisonment, or probation for life

These prison terms could not be suspended and could not run concurrently with a prison sentence for another felony. Except for the optional sentence of probation for life for the 50 - 224.99 gram offense, there would be no parole or probation possibility. Second or subsequent convictions would carry a mandatory life imprisonment penalty.

Present Penalties:

Manufacture or delivery of schedule 1 or 2 narcotic drugs: imprisonment up to 20 years and/or a fine up to $25,000 at the court's discretion.

Manufacture or delivery of cocaine: imprisonment up to 7 years and/or a $5,000 fine.

Possession of schedule 1 or 2 narcotic drugs: imprisonment up to 4 years and/or a $2,000 fine.

Possession of cocaine: imprisonment up to 2 years and/or a $2,000 fine.

ILLEGAL MANUFACTURE OR DELIVERY LESS THAN 50 GRAMS

Imprisonment for up to 20 years and/or a $25,000 fine, at the court's discretion. (Same as present penalty.)

ILLEGAL POSSESSION LESS THAN 50 GRAMS

Imprisonment for up to 4 years and/or a fine up to $2,000. (Same as present penalty.)

ILLEGAL USE OF A CONTROLLED SUBSTANCE

Penalties for the illegal use of a controlled substance would remain the same, except for the fine for cocaine use, which would be increased from $1,000 to $2,000.

SALE TO MINORS

Presently, an adult who gives or sells a schedule 1 or 2 narcotic drug to a person under 18 and at least 5 years younger than the adult may be fined up to $25,000 and/or imprisoned up to 40 years – double the prison term otherwise authorized for manufacture or delivery. The bill would include the distribution of cocaine in this "double maximum" provision.

FIRST OFFENSE

Presently, in the case of a first violation for possession of any controlled substance, the court has the option of deferring proceedings and placing the violator on probation. If the person then meets the conditions of probation, the case is dismissed without an adjudication of guilt. The bill would exempt first violations for possession of schedule 1 or 2 narcotic drugs and cocaine in amounts over 225 grams from this option.

PLEA-BARGAINING

Once a defendant had been arraigned on a warrant, indictment, or information for one of the mandatory sentence offenses (225 or more grams of schedule 1 or 2 narcotics or cocaine), or conspiracy to commit such an offense, dismissal upon the motion of the prosecuting attorney could only be "with prejudice" that is, a dismissal which precluded any further action on the same charge. Further, the prosecuting attorney could not reduce the charge if at the end of the preliminary examination it appeared to the examining magistrate that 1 or more of the offenses had been committed and there was probable cause to charge the defendant. The bill would also prohibit the court from accepting a plea of guilty, guilty but mentally ill, or nolo contendere to any lesser offense without such a plea to 1 of the mandatory sentence offenses (50 or more grams).

AUTHORIZED DISTRIBUTION OF CONTROLLED SUBSTANCES

Under the present law, certain persons such as pharmacists may be registered to legitimately dispense, prescribe, manufacture, or study controlled substances. This registration may be denied, suspended, or revoked if the person has filed a fraudulent application, violates any state or federal drug law, loses his/her federal registration, or promotes any controlled substance to the general public. The bill would specifically state that the registration authorizes only the manufacturing, prescribing, or dispensing which is for legitimate medical or therapeutic purposes and in the course of the registrant's professional practice. Unauthorized manufacturing, prescribing, or dispensing could result in loss of registration, as could

violation of any provision of, or rule promulgated under, the Contolled [sic] Substance Act of 1971. In addition, a registered practitioner who illegally dispensed, prescribed, or administered a controlled substance would be subject to prosecution for illegal manufacture, delivery, or possession of a controlled substance.

The bill is tie-barred to House Bills 4191, 4192, 4193, 4194 and 4195.

The effective date of the bill is specified as September 1, 1978.

FISCAL IMPLICATIONS:

The House Fiscal Agency has recommended that the bill be referred to the Appropriations Committee on the basis of the fiscal effect for offenders caught with possession of more than 50 grams of narcotics or cocaine. They state, "according to the Department of Corrections annual report, there were 15 offenders in prison for sale of narcotics with a maximum of life imprisonment at the end of 1974. If this bill were in effect, their sentences would be mandatory life. There were also 129 offenders in prison for unlawful sale and distribution of narcotics which carries a present maximum of 20 years. It is impossible to tell which category these offenders would fall into, as there is no way to determine the quantity of narcotics with which they were caught; however, with an estimated annual cost of $5,000 per prisoner year, the long-range costs of this bill would be enormous and the prison population would greatly increase."

The Department of Attorney General notes that whenever legislation of this nature is passed, the department charged with enforcement looks to the Attorney General to provide legal advice and counsel, increasing the overall demand for legal services and necessitating increased funding for the Department of Attorney General. In addition, legislation such as this often leads to more litigation which also requires enlargement of the Attorney General's staff.

The Department of Public Health believes that, if the bill proved effective, the number of addicted inmates in prison would increase, and that unless treatment programs including methadone maintenance in prison were significantly expanded, control problems and substance abuse among inmates would increase measurably. In this event, the department would expect the Department of Corrections to request a dramatic expansion of its substance abuse contractual relationship with the Office of Substance Abuse Services. The department also points out that the bill could increase court costs significantly, since the severe proposed penalties would lead many defendants to request jury trials. In addition, at the local level, the staffs of judges, prosecutors, and enforcement agencies would probably be expanded.

BACKGROUND INFORMATION:

In 1973, the state of New York enacted the nation's toughest drug laws, with mandatory minimum sentences of 15 years to life imprisonment for possession of 2 ounces or more, or sale of 1 ounce or more of a narcotic drug. The question of the success or failure of these laws is still

highly controversial. Those in favor of the law claim that it has helped stem an epidemic rise in narcotic addiction. Critics of the law insist that it is a false solution which has accomplished nothing while doing great harm to enlightened criminal justice. Statistics from New York now indicate that despite substantially increased enforcement efforts and expenditures, the stiff New York drug laws have not reduced the state's drug problem. Opponents of House Bills 4190 - 4195 maintain that this apparent failure is due to flows inherent in any legislation which attempts to use a tough, mandatory sentencing approach to solve the heroin problem. Supporters of the bills, however, deny that the New York laws have clear applicability, stating that House Bills 4190 - 4195 are significantly different in several areas. In particular, they point out that the bills are specifically aimed at a higher echelon of drug dealing, and that the prohibition on plea bargaining is drafted to avoid the problems that the rigidity of the New York laws has caused. Many opponents of the New York law favor the British method of dealing with the narcotic problem, which allows physicians to legally prescribe morphine or heroin for addicts. As with the New York laws, the success of the British method is open to great controversy. Its proponents claim that it has eliminated black-market drug dealing and related crime, while offering a greater opportunity for addicts to lead useful lives. Its critics claim that legalized addiction does not truly rehabilitate addicts, and that governmental sanction of drug abuse is unhealthy, unethical, and unwise.

ARGUMENTS ADVANCED FOR AND AGAINST THE BILL:

For:

All of society is a victim of the illicit drug scene. Not only does widespread narcotic addiction cause a serious loss of human resources, but black-market drug dealing creates a spiral of drug-related crime. The magnitude of the narcotics problem in Michigan necessitates tougher law enforcement policies. The penalties imposed by the bill for major drug dealing are severe, but they are not inappropriate in terms of the harm drug dealers do to society.

For:

The severe penalties imposed by the bill would have an important deterrent effect on illicit drug dealing. With the present drug penalties and parole possibilities, dealers feel that if caught they will spend little or no time in prison. The risk to them seems relatively small, and the potential for profit great. Consequently, only more severe penalties and the certainty of punishment will serve to deter would-be violators. The bill also contains an important exception to the mandatory prison sentence provisions by allowing a life probation option in the 50 to 224.99 gram offense category. This could be used as an incentive for lower-echelon drug dealers to give valuable information on major drug dealers.

For:

The bill would ensure that persons convicted of drug dealing spend substantial periods of time in prison. By keeping drug dealers off the streets for longer periods of

time, it will help reduce illicit drug activity. Further, it will help improve police morale.

Against:

Instead of ensuring that the state's major drug dealers spend substantial periods of time in jail, the bill could backfire. Convictions on drug charges could become more difficult to obtain, because juries might be more apt to acquit in reaction to the severe penalties. In addition, it has been suggested that one possible negative consequence of the bill would be that major drug dealers who are the intended target of the legislation might use addicts to transport large quantities of drugs rather than take the risk of facing long mandatory prison sentences themselves. If this happened, the drug traffic would continue and only addicts, who are already "victims" of the drug scene, would be faced with long prison sentences.

Against:

The bill would provide stiff, mandatory penalties for the illegal sale of cocaine, identical to the penalties for narcotics. This is unwarranted. Cocaine is not a narcotic and the physiological effects of cocaine are substantially different from those of heroin and other opiates. Furthermore, quantities of cocaine and heroin are not equivalent in terms of potency or market value. Consequently, the effect of the bill is to provide stiffer penalties for cocaine than for heroin.

For:

While cocaine does not have the addictive effect of heroin, the bill's grouping of cocaine with heroin is justified. Because the profit margin for cocaine is nearly as high as for heroin, with fewer risks, cocaine dealing is a fast-growing phenomenon, often involving people who also deal heroin. It is further claimed that because of the high profits, cocaine dealing now generates related criminal activity.

Against:

Severe, mandatory prison sentences are a simplistic approach to the complex problem of illicit drug activity. There is no real evidence that they will serve as a deterrent to crime. A deterrent effect could be reasonably hoped for only if the state could ensure certainty of apprehension as well as certainty of punishment.

Given size of the state's addict population and the potential for profit, new dealers would quickly take the places of those sentenced to mandatory jail terms. Meanwhile, the problems which provoke and foster drug addiction remain unaddressed. In fact, many critics of the strict law enforcement approach to drugs believe that it is not only a futile method, but one that ultimately worsens the problem. When one major heroin channel is broken and the supply decreases, the price of heroin increases proportionately, and profitability soars. This can create a type of "crime inflation", since the price of heroin appears to have a direct effect on street crime.

Against:

Mandatory minimum sentences undermine the modern concept of criminal justice, which endeavors to treat individual defendants separately, fairly, and with due process of law. The bill stresses punishment and thwarts rehabilitation. If prisons are to be "correctional" instead of punitive, prisoners must have incentives to participate in prison rehabilitation programs. By requiring a fixed prison term, with no possibility of parole, the bill destroys that incentive.

Further, the bill could impose an intolerable burden on the state's courts and penal institutions, because criminal defendants faced with severe mandatory sentences would insist upon jury trials, and long prison terms with no possibility of parole would quickly overload the already overcrowded prisons.

Against:

The power to sentence should belong to judges; the bill would, in effect, shift that power from judges to prosecutors. Sentencing judges must have unrestricted power to choose an appropriate sentence according to the condition of the defendant, the record of prior criminal activity, and the requirement of public protection. Discretion in sentencing is particularly important on drug offenses, because so many violators are victims of their own addiction and poverty.

It has also been suggested that so severely restricting prosecutorial discretion in post-arraignment proceedings may be violative of the separation of powers doctrine.

POSITIONS:

The Detroit Police Department, Narcotics Section supports the bill. (3-8-77)

The Michigan District Judges' Association Legislative Committee supports the bill. (3-8-77)

The Michigan Sheriffs' Association supports the bill. (3-8-77)

The Michigan State Police support the bill. (3-8-77)

The Wayne County Organized Crime Task Force supports the bill. (3-8-77)

The State Board of Pharmacy within the Department of Licensing and Regulation supports the bill as reported out of the House Judiciary Committee. (3-8-77)

The Michigan Association of Chiefs of Police supports the bill. (3-8-77)

The Prosecuting Attorneys Association of Michigan supports the bill. (3-8-77)

The Michigan Council on Alcohol Problems opposes the bill. (5-38-77)

The Department of Attorney General does not support the bill. (3-24-77)

The Department of Public Health does not support the bill in its present form. The Office of Substance Abuse Services, within the department, believes that the imposition of drastically increased penalties against drug traffickers must be accompanied by serious consideration of expanded treatment and rehabilitation activities to assure adequate care for addicted persons. (4-8-77)

POSSESSION OF OVER 650 GRAMS IN OTHER STATES

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
ALABAMA (Code of Ala)	13-A-211 (Distribution)	Class B Felony punishable by 2-20 yrs (per 13A-5-6)	(Mandatory life sentence for over 10 kilos)
	13-A-212 (Possession)	Class C felony punishable by 1-10 yrs.	
	13 A-12-231 (Trafficking)	500g-1 kilo mand. min 5 yrs. fine $100,000 (or less)	
ALASKA (Alaska Stats.)	11.71.030 (See Appendix A – Agg & Mitigating sentence factors)	Class B penalty punishable (per 12.55.125(a) – penalty prov.) as follows 1st offense 0-10 yrs. 2nd offense 4-10 yrs. 3rd offense 6-10 yrs.	No life sentence
ARIZONA (Revised Statutes Annotated)	13-3408(A)(1) Possession	13.701(c)(3) 4 yrs.	No life sentence
	13-3408(A)(2) Possession for sale	Punishable by 7 yrs. unless hab. off. or increased by 25% for agg. factors or decreased by 50% due to mitigating factors	
	13-3408(A)(7) Transporting for sale		

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
ARKANSAS	Ark Stats § 5-64-401	Possession = 2 to 5 years, $10,000, Manuf., del, over 400g, 40 yrs & $250,000	No life sentence
CALIFORNIA (West's Ann. Calif. Codes)	Calif. Health & Safety Code § 11351 Poss. for sale	2,3,4 yrs.	No life sentence
	§ 11352 Transporting sale, giving away	3,6, or 9 yrs § 11370.4(2) if more than 3lbs add 5 yrs to sent. (3) more than 25 lbs add 10 yrs. (4) more than 100 lbs. add 15 yrs.	Penal Code § 300 Parole after term set by 1170 of penal code § 1170 presumes sent at middle term unless agg or mitigating circumstances
COLORADO (Colo Rev. Stats.)	18.18.105(3) (unlawful distribution, manuf., dispensing, sale or possession) 18.1.105 (penalty prov.)	28g or more of material containing cocaine 4-16 yrs. $3,000 – 750,000 Mand. Min. 4 yrs.	No life sentence

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
CONNECTICUT (Conn. Gen. Stats. Ann.)	CGSA 21a-279	First offense 0-7 yrs	Life sentence. Parolable after minimum sentence
	CGSA 21a-278(a) 54-125	Possession with intent to sell 1 ounce of cocaine or more (1/2 oz. of coke in free base form). Min. (if not drug dependent) 5-20, Max-life	
DELAWARE (Del. Code Ann.)	16 § 4751(a) 11 § 4205	Addict up to 25 yrs and $5,000.00 to $50,000.00 Non addict $25,000.00 to $100,000 & min. 30 yrs without parole	No life sentence. Parolable after 30 years
DIST. OF COLUMBIA (D.C. Code)	§ 33-541(a)(2)(A) § 33-541(c)(1)(A)	4-15 yrs. $1,000 or both Mand. min. 4 yrs (c)(1)(A) (c)(2) Mand. min. can be suspended if no prior VCSA conv. & defendant is still addict	No life sentence
FLORIDA (West's Fla. Stats. Ann.)	893.13 Manufacture, possession, sale	up to 15 yrs 15 yrs, 400g or more	No life sentence
	893.135 Trafficking	mand. min 15 yrs. 400g or more	

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
GEORGIA (GA. Code Ann.)	79A-811[16-13-30] (a) possession	2 to 15 yrs (2nd or subseq offense 5 to 30)	Life for 2nd offense
	(b) Manuf., del, disp, adminstr, sale, poss w/i del	5 to 30 (2nd offense "shall be imprisoned for life")	
	79 A-811 [16-13-31] Sale, manuf, del, brings into state	400g or more $1 million fine, Mand. min. 25 yrs.	
HAWAII (Hawaii rev. Stats.)	329-41(a)(1) & (b)	not more than 5 yrs. nor more than $5,000.00 or both	No life sentence
IDAHO (Idaho Code)	ICS 32-2732(a)(1)A 20-233(a)	Up to life, $25,000.00 or both	Life. Parolable after 10 yrs. [per 20 -233(a)]
ILLINOIS	SHA 56 1/2 § 1401(a)(1)(2) 56 1/2 § 1401.2(2) 56 1/2 § 1401(a)(11)	not less than 12 nor more than 50 yrs. Up to $500,000.00	No life sentence
INDIANA (Indiana Stats. Ann.)	ISA 35-48-4	3g or more, 30 yrs., $100,000.00	No life sentence

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
IOWA (Code Ann.)	204.401(1) (a) (b) (2) (a) 21-4501 (penalties)	500g-1 kilo of cocaine (or 5-50g crack cocaine is Class C felony)	No life sentence
		3 to 5 yr minimum; 10 to 20 yr max, not more than 25 yrs.	
KANSAS (Stats. Ann.)	KSA 65-4127	life imprisonment	Life sentence. Parolable after 15 years without good time credit reduction
KENTUCKY (Rev. Stats)	KRS 218A-990(1)	$5 to 10 yrs $5,000-$10,000 or both. Each Subseq. VSCA off 10 to 20 yrs. $10,000.00-$20,000.00 or both	No life sentence
LOUISIANA	LSARS 40-967(A)&(B)(F)	400g or more, 15 to 30 yrs at hard labor. $250,000 to $600,000	No life sentence. Apparently parolable because not explicitly precluded for offense involving powdered cocaine.
			Parole precluded for offenses involving crack 40-967(B)(3)
MAINE (Maine Rev. Stats.)	17A § 1103(3)	14g or more (per 17A § 1252). 0 to 10 yrs. $10,000	No life sentence

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
MARYLAND (Code 1957)	Code 1957 27-286(F)(1)&(3)	448g or more. 0 to 20 yrs. $25,000, or both. Mand. min 10 yrs.	No life sentence. Parolable after 10 years.
MASSA-CHUSETTS (Ann Laws of Mass.)	94C: § 32A	2 1/2 to 10 yrs in prison or not more than 2 1/2 yrs in jail, not less than $1000 nor more than $10,000. Mand min. of 1 yr.	No life sentence. Mand. Min. of 1 yr.
MINNESOTA (Stats. Ann.)	MSA 152.021(1)&(2)	0 to 30 yrs not more than $1 million or both	No life sentence
MISSISSIPPI	Code 1972 41-29-139(b)(1)	0 to 30 yrs, not more than $1 million or both	No life sentence
MISSOURI	195.202 (Possession)	Class C felony punishable by term up to 7 yrs [per 558.00(3)]	For sentences of 9 yrs or less at 1/3 of sentence.
	195.211 (Dist, Del, Manuf)	Class B felony 5 to 15 yrs [per 558.001(2)]	Sentences of 9 to 15 yrs at 3 yrs.
	195.222 (Trafficking, first Degree)	10 to 30 yrs or life, no parole	5 yrs for sentences of 15 yrs or more including life imprisonment
	195.223 Trafficking, 2nd degree	10 to 30 yrs or life, parolable	

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
MONTANA	MCA § 50-32-101 to 50-32-405 and 45-9-101 (crim penalty prov.)	2 yrs to life $50,000 (except as provided in 46-18222 – agg & mit. circumstances – Appendix C)	Life sentence but use of agg & mit.
NEBRASKA	R.R.S. 28-146(4)&(5)	7 oz or more max 50 yrs, mand min. 5 yrs.	No life sentence
NEVADA (Rev. Stats)	N.R.S. 453.3395 .458.3405	400 g or more, 15 to life not less than $250,000	After serving minimum
NEW HAMPSHIRE (Revised Stats. Ann)	NHRSA 318 B: 26(1)(a)	5 oz or more, 0 to 30 yrs, $500,000 or both, poss life for habitual drug offender	Life for habitual offender
NEW JERSEY (Statutes Ann)	NJSA 2C: 35-5(a)(1)&(b)(1) 2c: 43-6 (crim penalty prov. for 1st degree crime)	1st degree crime for 5 oz. or more, 10 to 30 yrs, up to $300,000	Min. sent. at or between 1/3 to 1/2 of maximum, during which defendant ineligible for parole. But per 2c: 35-12, prosecutor may waive mandatory minimum in plea negotiations.

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
NEW MEXICO (Stats Ann)	NMSA 30-31-20(B) 31-18-15 31-18-15(C)	2nd degree felony, 9 yrs. and/or $10,000	Parolable
		2nd or subsequent offense, 1st degree felony = 18 yrs.	
NEW YORK (Penal Law)	220.43 (2 oz or more) sale	AI felony; max life, min 15 to 25	After serving minimum
	220.42 (1/2 oz or more) sale	A II felony; 3 to 8 min; max life	
	220.06 (poss. w/i del.) 70.00 (penalty prov.)	Class D felony, Max sent. 7 yrs and min. 1 yr	
NORTH CAROLINA	B.S. 90-95(a)(1) 90-95(h)(3)(C)	28-200g, Class G felony, at least 7 yrs & $50,000 200g to 400g, Class F felony; at least 14 yrs & $100,000	
		400g or more, Class D felony, not less that 35 yrs and $250,000	
NORTH DAKOTA	NDCC 19-03-1-23.101 12.1-32-01	Class AA felony up to life for 500g or more (per 19.03.1 – 23.1(a)(C)(2)(b)	After 30 yrs in minus reduction for good time [12. 1-32-01.(1)]

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
OHIO	RC2925 (contr subs. act) RC2911 (pen. provs.)	3rd degree felony, 1 to 10 years, up to $5,000	No life sentence
OKLAHOMA (Stats. Ann.)	63 § 2401(a)(1) dist., disp, poss, w/i del.	(B) (1) Not less [illegible] 5, nor more than Life and fine not more than $100,000. Sent. can be suspended/ deferred for first time offenders.	Life suspension for first time offenders
		(c) subsequent VCSA felony – penalty can be doubled	
	63 § 2402 unlawful poss.	(B)(1) 2 to 10 yrs	
		(C) Subsequent violation 4 to 20 years.	
OREGON (Rev. Stats.)	ORS 475.992(1)(b) Penalty provisions 161.605 (prison terms) 161.625 (fines)	Class B felony 10 years, not more than $100,000	No life sentence
PENNSYLVANIA	35 PS 780.113 (F) (1)	0 TO 15 yrs., up to $250,000 or both	No life sentence

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
RHODE ISLAND	RI21-28.401(A)(1)(A) (2&(B) 102 to 1 kilo 21-28.4.01.2	1 oz to 1 kilo – mand. min 10 yrs & possible min of 50 yrs.	No life sentence
		Drug addicted person (A) (2) 30 yrs & $100,000 more than 1 kilo-20 yrs to life, departure from minimums allowed for substantial and compelling reason.	
SOUTH CAROLINA	Code 1976 44-53-370(e)(2)(e)	400 g or more mand. min of 25-30 yrs., $200,000	After 19 yrs on life sentence
SOUTH DAKOTA	SDCL 22-42-2	10 yrs, $10,000, Mand min of at least 1 year.	No life sentence
TENNESSEE	TCA 39-6-417(c)(1)(E)	30g or more, 10 to life, up to $200,000(c)(2)	After 19 yrs. on life sentence
TEXAS	Tx Health Code 481.116	400g or more, life	On life sentence after 20 yrs.

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
UTAH	UCA 58-37-8 (1) (a) (i)	1 to 15 yrs., If firearm used, 1 year consecutive (at least) and may be 4-5 years term	No life sentence
VERMONT	T 16 § 423	Sale of 1 ounce or more, 0 to 20 years, up to $1 million or both	No life sentence
VIRGINIA	Code 1950 54 § 18.2-248	5 to 40 years & up to $100,000	No life sentence
WASHINGTON	West SRCWA 69.50.40(a)(1)	2 kilos or less, 0 to 10 years, up to $25,000	
WEST VIRGINIA	Code 60A-4-401	1 to 5 years or up to $15,000 or both	
WISCONSIN (Statutes Ann.)	W.S.A. 161.41(c)(3)	more than 30g, 1 to 15 years, $1,000 to $500,000	
WYOMING	W.S. 35-7-1031	0 to 20 years, up to $25,000 or both	

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No. 89-7272

In The

Supreme Court of the United States

October Term, 1990

RONALD ALLEN HARMELIN,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals Of Michigan

BRIEF OF RESPONDENT

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QUESTION PRESENTED

1. WHETHER A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR POSSESSION OF OVER 650 GRAMS OF PURE COCAINE VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT?

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STATEMENT OF THE CASE

For the most part, Respondent accepts Petitioner's Statement of the Case. It should be added, however, that the 672.5 grams of cocaine involved were pure with no dilutants. (J.A., p. 2, Chemist's Laboratory Report)

As to Petitioner's professional status, the presentence report indicated that the Oakland County Narcotics Enforcement Team (N.E.T.) and Oak Park Police described Petitioner "as a large-scale drug dealer, delivering down to mid-level dealers." The street price of the confiscated cocaine was estimated as between $67,000 and $100,000. (J.A., p. 9) Petitioner states there was no offer of proof as to his alleged drug-trafficking. (Petitioner's brief, p. 4) However, as Petitioner admits, the contents of the presentence report was not challenged at the time of sentencing. Petitioner's trial counsel indicated: "I have had an opportunity to go through the presentence report. As to the factual allegations only, I have no difficulty with them. I believe them to be accurate." (J.A., pp. 14-15)

In the presentence report, Petitioner denied "drug trafficking." He claimed he earned $500 to $800 a week

playing pool. Petitioner retained his attorney for $15,000, paid for by an associate of Petitioner's, according to police investigation. (J.A., pp. 12-13)

SUMMARY OF THE ARGUMENT

Petitioner makes the emotional argument that Michigan's statutorily-mandated sentence of life in prison without parole constitutes cruel and unusual punishment in violation of the US Const, Amend VIII. Respondent submits that given that Petitioner was convicted of possessing 672.5 grams of pure cocaine worth between $67,000 to $100,000, Petitioner cannot complain of the harshness of the sentence he received. Drug-trafficking is one of the greatest and gravest dangers facing the United States. Michigan's mandatory penalty for those dealing in large quantities of drugs is not grossly disproportionate as a weapon in the national war on drugs. That Michigan's penalty may be one of the harshest in the nation is beside the point under the doctrine of federalism.

I. A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR POSSESSION OF OVER 650 GRAMS OF PURE COCAINE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

A. Michigan's State Interest In Fighting Drugs

On February 26, 1987, Petitioner was found guilty by the trial judge of possession of over 650 grams of a substance containing cocaine, in violation of MCL 333.7403(2)(i) and of possession of a firearm during the

commission of a felony in violation of MCL 750.227b. On April 30, 1987, he was sentenced to a mandatory term of imprisonment of two years on the felony-firearm charge and to a consecutive mandatory life term on the cocaine charge.

The crimes in question occurred on May 12, 1986. Until amendments which became effective March 30, 1988, MCL 333.7403 provided:

> Sec. 7403. (1) A person shall not knowingly or intentionally possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv), and;
>
> (i) Which is in an amount of 650 grams or more of any mixture containing that substance is guilty of a felony and shall be imprisoned for life.
>
> (ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.
>
> (iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and shall be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life.

(iv) Which is in an amount of less than 50 grams of any mixture containing that substance is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than $2,000.00, or both.

(b) A controlled substance classified in schedule 1, 2, 3, or 4, except a controlled substance classified in schedule 1 for which a penalty is prescribed in subdivision (a), (c), or (d), is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.

(c) Lysergic Acid Diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(d) Marihuana, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

MCL 333.7403 codified section 7403 of Mich Public Act 368 of 1978 which became effective September 30, 1978. MCL 333.7214(a)(iv) codified section 7214(a)(iv) of Act 368 and specifically encompassed cocaine.

Also part of Mich Public Act 368 was section 7401 which prohibited the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance. The penalties were the same as for possessing schedule 1 and 2 controlled substances in amounts greater than 50 grams. This section became codified as MCL 333.7401 and included in section 7401(3) a provision

for no parole during the mandatory terms. MCL 333.7401 provided:

> Sec. 7401. (1) Except as authorized by this article, a person shall not manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv) and:
>
> (i) Which is in an amount of 650 grams or more of any mixture containing that substance is guilty of a felony and shall be imprisoned for life.
>
> (ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.
>
> (iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and shall be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life.
>
> (iv) Which is in an amount less than 50 grams of any mixture containing that substance is guilty of a felony and may be imprisoned for not more than 20 years, or fined not more than $25,000.00, or both.

(b) Any other controlled substance classified in schedule 1, 2, or 3, except marihuana, is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $5,000.00, or both.

(c) A substance classified in schedule 4 or marihuana, is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than $2,000.00, or both.

(d) A substance classified in schedule 5, is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.

(3) A term of imprisonment imposed pursuant to subsection (2)(a)(i), (ii), or (iii) or section 7403(2)(a)(i), (ii), or (iii) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. An individual subject to a mandatory term of imprisonment under subsection (2)(a)(i), (ii), or (iii) or section 7403(2)(a)(i), (ii), or (iii) shall not be eligible for probation, suspension of that sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life.

Mich Public Act 368 of 1978 began as Mich House Bill 4190 of 1977. The House Legislative Analysis of the bill (as enrolled), dated May 17, 1978,[2] explained the problem the bill was intended to address:

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[2] The legislative analysis in Brief of Petitioner, Appendix p. 5, was dated March 16, 1977 and was prepared after passage in the House. The final bill dropped wiretapping as part of its package.

THE APPARENT PROBLEM:

Despite the efforts of law enforcement and drug education personnel, there has been a steady increase in narcotics traffic and drug abuse in Michigan, with a corresponding increase in drug-related crime. Some persons claim that the state has failed to stem drug traffic because the penalties for drug dealing are not severe enough, and law enforcement tools are inadequate. They contend that the potential for profit in drug dealing is so great that Michigan's present penalties pose little or no deterrent to would be violators, with lenient probation and parole policies weakening the threat of imprisonment still further. Police officers involved in narcotics investigation also complain that they are arresting the same persons over and over because convicted drug dealers are quickly returned to the illicit drug scene through probation and parole.

Since 1978, the Michigan Legislature has twice amended some of the penalties of MCL 333.7401 and MCL 333.7403. Mich Public Act 275 of 1987 and Mich Public Act 47 of 1988 took effect March 30, 1988 and changed some of the penalties. Notably, the mandatory minimum sentences for an amount of 225 grams or more, but less than 650 grams, was lowered to ten years from twenty. The mandatory minimum for an amount of 50 grams or more, but less than 225, was lowered to five years from ten. More significantly, the statutes were amended to allow the sentencing court to depart from the minimum terms specified for all the amounts *except 650 grams or more* "if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7401(4); MCL 333.7403(3).

Finally, effective September 28, 1989, Mich Public Act 143 of 1989 changed the mandatory minimums for over 225 grams and over 50 grams back to 20 years and 10 years respectively. MCL 333.7401(2)(a)(ii) and (iii); MCL 333.7403(2)(a)(ii) and (iii) (West Supp. 1990)[3]

Over the years, the Michigan Court of Appeals has, as in the case at bar, sustained the imposition of the mandatory life imprisonment penalty for the manufacture, delivery or possession of 650 grams or more of the specified controlled substances. In *People v Romano*, 181 Mich App 204, 219; 448 NW 2d 795, 802 (1989), the Court summarized its repeated holdings:

> This court has upheld the constitutionality of M.C.L. § 333.7403; M.S.A. § 14.15 (7403), as well as the similar statute M.C.L. § 333.7401; M.S.A. § 14.15(7401), and repeatedly found that they did not constitute cruel and unusual punishment. See, e.g., [*People v Hamp*, 170 Mich App 24, 37 (1988)] 428 N.W.2d 16; *People v Leighty*, 161 Mich.App. 565, 583, 411 N.W.2d 778 (1987), lv. den. 430 Mich 895 (1988); *People v Acosta*, 153 Mich.App. 504, 515, 396 N.W.2d 463 (1986), lv. den. 428 Mich 865 (1987); *People v Matthews*, 143

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[3] The reason for this amendment was provided in the House Legislative Analysis of the enactment, Mich House Bill 4698 (as enrolled), dated July 28, 1989:

> The acts (Public Act 275 of 1987 and Public Act 47 of 1988) reducing specified minimum prison terms for illegal manufacture, delivery, or possession of larger quantities of narcotics and cocaine dangerously weakened the law governing controlled substances offenses. The bill would deter drug trafficking by increasing those mandatory minimum prison terms back up to their original levels.

> Mich.App. 45, 64, 371 N.W.2d 887 (1985); *People v Campbell*, 115 Mich.App. 369, 376-381, 320 N.W.2d 381 (1982), lv. den. 417 Mich 879 (1983). This Court has specifically considered and rejected the argument that life imprisonment for a conviction under M.C.L. § 333.7403(2)(a)(i); M.S.A. § 14.15(7403)(2)(a)(i) constitutes cruel and unusual punishment. *People v McCarty*, 113 Mich.App. 464, 317 N.W.2d 659 (1982), lv. den. 414 Mich 958 (1982).

In *People v McCarty*, 113 Mich App 464, 467-472; 317 NW 2d 659, 660-662 (1982), the Court reinstated the charge of possession of cocaine of 650 grams or more dismissed by the trial court:

> The United States Constitution prohibits cruel *and* unusual punishment. The Michigan Constitution prohibits cruel *or* unusual punishment. [Mich Const 1963, art 1, § 16] The trial court found that the penalty prescribed by the statute constituted cruel *and/or* unusual punishment. [emphasis in original]

The dominant test for determining if a given punishment constitutes cruel and/or unusual punishment was stated in *People v Lorentzen*, 387 Mich 167, 176, 194 N.W.2d 827 (1972), as whether "the punishment is in excess of any that would be suitable to fit the crime."

At first blush, we are inclined to agree with the trial court, but after closely examining the nature of the act, gleaning the overall legislative scheme from recent decisions and legislative comments, and after reviewing the penalties prescribed by other jurisdictions, we reach the following conclusions.

The questioned statute is an integral part of an overall legislative scheme designed to stamp out

illicit sale, possession, and use of certain dangerous and/or addictive substances by *providing graduated punishment* for offenses involving greater amounts of mixtures containing controlled substances. In finding that the graduated penalty provisions of the statute are not violative of the title-object clause and the equal protection and due process clauses, the Court, in *People v Lemble*, 103 Mich App 220, 222, 303 N.W.2d 191 (1981), stated:

> "The statutory scheme of the controlled substances portion of the health code punishes those found to be in possession of greater amounts of mixtures containing controlled substances with more severe penalties. We find that the legislative policies underlying criminal penalties – rehabilitation of the offender, society's need to deter the behavior in others, the prevention of the offender from causing injury to others – are achieved by this statute's graduated punishment. *People v Lorentzen*, 387 Mich 167, 194 N.W.2d 827 (1972). The penalties that may be imposed under this statute do not shock the judicial conscience in light of the gravity of the offenses."

* * *

We point out that before legislation is enacted various committees seek community input. The information obtained is examined closely to determine what laws need to be enacted to assist the community in its continuing battle against the illegal sale, possession and use of narcotics. The Legislature, because of the information it obtains and the studies it conducts, is better equipped than we, the courts, to draft laws to combat the serious problems of society.

It is our opinion that the mandatory life sentence provision for possession of 650 or more grams of a controlled substance was well-thought out by the Legislature, and premised upon two of the legislative policies underlying criminal penalties mentioned in *Lemble* which were: (1) the prevention of the offender from causing injury to others; and (2) society's need to deter the behavior in others.

The *amount specified in the statute, 650 or more grams, is a large quantity that suggests an amount involving major drug dealers.* Considering that the street value of 650 or more grams of cocaine is close to one million dollars, the number of lives affected by the possession, sale or use of this drug would be substantial. Certainly, in establishing the lifetime penalty provision for this offense, the Legislature sought to prevent an offender from causing further injury to others which would necessarily result from involvement with a large quantity of a controlled substance.

Moreover, it is apparent that deterrence of this conduct was a major factor in prescribing a mandatory life sentence for this offense. *Society's need to deter this behavior in others is warranted by the magnitude of problems involving drugs that society faces.*

After reviewing the statutes in other jurisdictions, comparatively the Michigan statute imposes the most severe penalty for possession of a controlled substance of the quantity involved in this case. However, the *Michigan statute is also the most progressive. It provides graduated penalties depending upon the amount possessed,* ranging from probation for possession of

a small amount to the lifetime imprisonment penalty for possession of an amount of 650 or more grams. Most other jurisdictions provide one penalty for all offenders.

On the bases of the gravity of the offense, the potential injury to others, and society's need to deter this behavior in others, as well as other reasons stated within this opinion, we must conclude that the information gathered by the Legislature required a severe penalty for this crime, and we at this juncture have not been able to determine that this legislation was unwise nor the penalty imposed cruel and/or unusual.

(footnotes omitted; emphasis added)

B. Proportionality In Non-Capital Cases

Petitioner relies upon this Court's proportionality analysis in *Solem v Helm*, 463 US 277 (1983) to argue that his sentence of mandatory life imprisonment is cruel and unusual under the Eighth Amendment. However, any analysis involving *Solem* must also take into consideration this Court's decisions in *Rummel v Estelle*, 445 US 263 (1980)[4] and *Hutto v Davis*, 454 US 370 (1982).

In *Rummel*, 445 US at 274, this Court held that a life sentence imposed under Texas's recidivist law upon a

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[4] In *Solem*, 463 US at 288, n. 13 and 463 US at 303, n. 32, this Court emphasized that it was not overruling *Rummel* but was, in fact, being consistent with it. The facts, however, were distinguishable because Rummel was eligible for reasonably early parole whereas Helm, at age 36, was sentenced to life with no possibility of parole.

defendant thrice convicted of property-related felonies did not constitute cruel and unusual punishment. The Court stated that as to its prior decisions applying the prohibition of cruel and unusual punishments:

> . . . one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.[11]

---

[11] This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, post, at 288, if a legislature made overtime parking a felony punishable by life imprisonment.

Whereas a "bright line" can be drawn between the punishment of death and "the various other permutations and commutations of punishment short of that ultimate sanction," the line-drawing would be much more difficult for "any constitutional distinction" between different terms of years. *Id.* at 275. The Court pointed out that such basic line-drawing "is pre-eminently the province of the legislature" and reiterated Justice White's caution in *Coker v Georgia*, 433 US 584, 592 (1977) that the Court's Eighth Amendment judgments should neither be, nor appear to be, merely the subjective views of the individual Justices. *Id.* at 274 – 275.

In *Rummel* at 276, this Court recognized the societal interest involved in the punishment of recidivists:

> Thus the interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts show that they are simply incapable of conforming to the norms of society as established by its criminal law.

Further, the Court stated:

> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.
>
> Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction. *Id.* at 284-285.

The Court warned that under federalism there will always be one state that will have the distinction of treating particular defendants more severely than any other state, 445 US at 281 – 282:

> Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly

> would render Rummel's punishment "grossly disproportionate" to his offenses or to the punishment he would have received in the other States.
>
> * * *
>
> Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.[27]

---

[27] The dissent draws some support for its belief that Rummel's sentence is unconstitutional by comparing it with punishments imposed by Texas for crimes other than those committed by Rummel. *Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative.* Embezzlement, dealing in "hard" drugs, and forgery, to name only three offenses, could be denominated "property related" offenses, and yet each can be viewed as an assault on a unique set of societal values as defined by the political process. The notions embodied in the dissent that if the crime involved "violence," see post, 295-296, n 12, a more severe penalty is warranted under objective standards simply will not wash, whether it be taken as a matter of morals, history, or law. Caesar's death at the hands of Brutus and his fellow conspirators was undoubtedly violent; the death of Hamlet's father at the hands of his brother, Claudius, by poison was not. Yet there are few, if any, States which do not punish just as severely murder by poison (or attempted murder by poison) as they do murder or attempted murder by stabbing. The highly placed executive who embezzles huge sums from a state savings and loan association, causing many shareholders of limited means to lose substantial parts of their savings, has committed a crime very different

from a man who takes a smaller amount of money from the same savings and loan at the point of a gun. Yet rational people could disagree as to which criminal merits harsher punishment. By the same token, a State cannot be required to treat persons who have committed three "minor" offenses less severely than persons who have committed one or two "more serious" offenses. If nothing else, the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first- or second-time offenders.

In short, the "seriousness" of an offense or a pattern of offenses in modern society is not a line, but a plane. Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute

> for several separate felony convictions not involving "violence" violates the cruel-and-unusual-punishment prohibition of the Eighth Amendment. As Mr. Justice Frankfurter noted for the Court in *Gore v United States*, 357 US 386, 393 (1958), "[w]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." (emphasis added)

Justice Powell in his dissent agreed that the States cannot be required to provide for uniform sentences, 445 US at 299, n. 19:

> A State's choice of a sentence will, of course, never be unconstitutional simply because the penalty is harsher than the sentence imposed by other States for the same crime. Such a rule would be inconsistent with principles of federalism. The Eighth Amendment prohibits grossly disproportionate punishment, but it does not

> require local sentencing decisions to be controlled by majority vote of the States.

In *Hutto v Davis*, this Court followed *Rummel* and upheld a sentence of two consecutive 20-year prison terms and two separate fines of $10,000.00 for convictions of possession with intent to distribute and distribution of approximately nine ounces of marihuana with a street value of about $200.00.

Justice Powell in concurring in the judgment "reluctantly" concluded *Rummel* was controlling. 454 US at 375. However, Justice Powell did concede that "under our system the limits of a prison sentence normally are a matter of legislative prerogative." *Id.* at 377.

Justice Brennan, with whom Justice Marshall and Justice Stevens joined, dissented and argued that *Rummel's* holding was rather narrow

> . . . in the context of Texas' habitual offender statute, the imposition of a life sentence on Rummel served the legitimate state interests of deterring recidivism and of segregating habitual offenders "from the rest of society for an extended period of time." [445 US] at 284.
>
> *Hutto v Davis*, 454 US 382.

Finally, in *Solem*, this Court for the first time found a sentence for a term of years to be grossly disproportionate to the crime and thus prohibited by the Eighth Amendment. Justice Powell, joined by the other dissenters in *Rummel*,[5] found that a life sentence without the

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[5] Justices Brennan, Marshall and Stevens.

possibility of parole for a seventh nonviolent felony[6] of uttering a "no account" check for $100.00 was significantly disproportionate to the crime and therefore prohibited by the Eighth Amendment. Justice Powell summarized at 463 US 290:

> In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.
>
> (footnote omitted)

In footnote 16 following this passage, Justice Powell stated in part:

> In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

When reviewing sentences, Justice Powell instructed that the courts should be guided by "objective factors" including: (a) the gravity of the offense and the harshness of the penalty; (b) the sentences imposed for other crimes in the same jurisdiction; and (c) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 290-292. Justice Powell assumed that courts were competent to judge the gravity of an offense "at least on a

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[6] Alcohol was a contributing factor in each of the offenses. 463 US at 280.

relative scale." Comparisons could be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. *Id.* at 292.

C. Solem Analysis

Respondent submits that in the case at bar Petitioner's life sentence is not so grossly disproportionate as to be cruel and unusual under the Eighth Amendment. Unlike in *Rummel* where the Court focused on and deferred to society's interest in punishing recidivists, in *Solem* the Court focused on the principal felony "one of the most passive felonies a person could commit." 463 US at 296 quoting *State v Helm*, 287 NW 2d 497, 501 (S.D., 1980) (Henderson, J., dissenting). See also: 463 US 296, n. 21.[7] Whether the focus is on Michigan's paramount interest in stamping out illegal drug trafficking or in examining the gravity of Petitioner's crime, the punishment of mandatory life imprisonment cannot be called grossly or significantly disproportionate.

The Michigan Legislature in 1978 enacted the mandatory life term for possession of 650 grams or more of cocaine because of an ever-increasing spiral of drug traffic, drug abuse and drug-related crime. Today, the situation appears to be even worse. According to President George Bush, the top priority for the United States is the

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[7] In *Solem*, Justice Powell did not concern himself with the legislature's prerogative apparently because South Dakota's recidivist statute made the imposition of life imprisonment discretionary. *Id.*, at 299, n. 26. Once a sentence of life imprisonment was meted out, however, the person so sentenced was not eligible for parole. *Id.* at 282.

"war" on illegal drugs. In that fight, the federal government will spend $10.6 billion annually. Deaths from cocaine and heroin abuse are increasing. In urban areas such as Detroit and Washington, D.C., the pathologies related to drug abuse – violent crimes and property crimes, AIDS, crack babies – are most pronounced. Urban murders, many of them drug-related, are likely to reach record numbers this year. In Michigan, an estimated 67,000 persons - 7.3 of every 1,000 state residents – use cocaine at least once a week.[8] In Detroit, one of the areas of the United States under heavy siege from crack cocaine since 1985, the first large group of crack-exposed 5-year-olds started kindergarten this fall. They suffer from an array of neurological, emotional and learning problems.[9]

In *Young v Miller*, 883 F2d 1276, 1285 (6th Cir., 1989), the Sixth Circuit Court of Appeals concluded under a *Solem* proportionality analysis that Michigan's mandatory term of life imprisonment for a first offender for possession with intent to deliver of 650 grams or more of heroin was not cruel and unusual:

> [E]ven assuming Michigan has the toughest drug law of all the states, the question, as we see it, is whether the Michigan statutory scheme is totally out of line with these other states. Clearly, most of the states listed above prescribe heavy penalties for drug trafficking, albeit with

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[8] "War On Drugs", *Detroit Free Press*, September 8, 1990, at 6A.

[9] "Crack Casts Pall Over Kindergarten", *Detroit Free Press*, August 8, 1990 at 1A.

> much more consideration for the criminal background and possibility of rehabilitation of the offender. In many of these states, the sentencing judge has the discretion to impose a life sentence or a significant term of years for drug traffickers. Additionally, given the present political climate, it may well be that many of these states will change their penal codes to provide for even stiffer sentences for drug offenders in the future. Thus, notwithstanding its harshness, we believe Michigan's drug law is in the range of the drug laws of other states.

Further, the Court stated:

> Considering the severity of the crime, we refuse to interfere with Michigan's efforts to punish major drug traffickers to the fullest extent of the law, even those who are first offenders. *Id.*

In the course of its *Solem* analysis, the Court remarked on the seriousness of the defendant's crime:

> We begin our *Solem* analysis with the first and primary factor – the gravity of the offense and the harshness of the penalty. Petitioner Young was convicted of possession with intent to deliver 650 grams or more of heroin. We have little doubt that her crime is one of the gravest a person can commit today. Young possessed with intent to distribute approximately 1300 grams of heroin (almost twice the amount upon which the penalty could be predicated), an extremely addictive narcotic. The ripple effect on society of such a large quantity of heroin is staggering to contemplate. Indeed, as one court has aptly observed: *"Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image – others who create others still, across our land and down our generations,*

> *sparing not even the unborn." Terrebonne v Butler,* 848 F.2d 500, 504 (5th Cir. 1988) (en banc), *cert. denied,* ___ US ___, 109 S. Ct. 1140 (1989). We thus consider the crime that Young committed to be very serious. (emphasis added)

In his dissent in *Rummel,* 445 US at 295, n. 12, Justice Powell had acknowledged that drug cases might not be easily compartmentalized under his proportional analysis:

> I do not suggest that all criminal acts may be separated into precisely identifiable compartments. A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault. But the difficulties of line-drawing that might be presented in other cases need not obscure our vision here.

The point is that in Michigan by making the sentence mandatory in 1978 the Legislature made clear the gravity with which it viewed the dealing in large quantities of drugs. Subsequently, in 1987 and 1989 when it eased and then tightened the mandatory penalties for less than 650 grams of schedule 1 and 2 controlled substances, it did not change the penalty for 650 grams or more. Thus, unlike in *Solem* where life imprisonment was discretionary with the sentencing court, the Michigan Legislature made its interest crystal clear. As such, this Court should as in *Rummel,* which after all is still viable, defer to the legislature's definitive statement of the public interest.[10] Michigan's controlled substance statutes have a rational

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[10] Note, *Solem v Helm: Extension of Eighth Amendment Proportionality Review to Noncapital Punishment,* 69 Iowa L R 775, 782-783, 793-794 (1984).

basis to Michigan's interests in eliminating the scourge of large-scale drug trafficking.[11] See: *Carmona v Ward,* 576 F2d 405, 410-412 (1978) *cert den* 439 US 1091 (1979).

Petitioner cites eleven other states that provide for possible life sentences, but with parole, for similar offenses. Some, however, do have mandatory minimums ranging from ten to thirty years. (Brief of Petitioner, pp 42-43). Petitioner received his sentence at age 42. Under Standard Mortality Tables, his life expectancy would be 30.41 years. MCL 500.834 (West Supp. 1990, p. 37). Although the sentence herein may be considered harsh, it is not out of line with the range available. In fact, it is similar to the 40-year sentence upheld in *Hutto v Davis* which involved nine ounces of marihuana. As noted by Justice Powell in his dissent in *Rummel,* 445 US 299, n.19, the principle of federalism would not allow the striking down of a sentence just because it is the most severe among the states. The question has to be whether it is

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[11] Built-in to Michigan's statute prohibiting possession is a clear legislative presumption that he who possesses a large amount of narcotics should be dealt with in the same way as a seller. *Cf., People v Broadie,* 37 NY2d 100; 371 NYS2d 471; 332 NE 2d 338, 343 (1975) *cert. den.* 423 US 950 (1975). Such is reasonable especially in Petitioner's case where the 672.5 grams of cocaine he was transporting was pure and worth between $67,000.00 and $100,000.00. Petitioner was arrested with the standard tools of the drug dealer: ten small packets of cocaine, three little vials of cocaine, a beeper, a coded address book, some marihuana cigarettes, assorted pills including Percodan and approximately $3,500 in cash.

grossly disproportionate. Respondent submits that given the evil being addressed, it is not.

Under the second *Solem* factor of examining sentences for other crimes in the same jurisdiction, in *Young v Miller*, 883 F2d at 1283, the Sixth Circuit found no gross disproportion:

> Large-scale drug traffickers (defined by the Michigan legislature as those persons possessing 650 grams of Level I narcotics or more) are treated the same as first-degree murderers (Mich. Comp. Laws § 750.316). Both receive mandatory life imprisonment without parole, without regard to the criminal record or rehabilitative potential of the offender. The Michigan Penal Code also provides for a mandatory life sentence with possibility of parole for treason (§750.544). It authorizes discretionary life sentences with possibility of parole for various other crimes such as second-degree murder (§750.317), attempted murder (§750.91), causing death by explosives (§750.327), armed robbery (§750.529), first-degree criminal sexual conduct (§750.520b(2)), and kidnapping (§750.349). *In its sentencing scheme, the Michigan legislature has recognized the devastating consequences of large-scale drug trafficking by treating that crime as being more serious than many of the violent crimes.* It has chosen to take the drug problem in its state "by the horns" by going after the major sources of illegal drugs. By imposing such a harsh penalty, it obviously hopes to provide a strong deterrent to those who would deal illegal drugs and possibly prevent some of the violent crimes often associated with drug trafficking. While one might question the trial court's lack of discretion in the sentencing process, we certainly do not believe that the punishment imposed for large-scale drug traffickers is in all cases inappropriate. (emphasis added)[12]

Also, as pointed out in *McCarty*, 317 NW2d at 467-472, the drug statutes provide for graduated punishment.

D. Individualized Sentencing

Petitioner attempts to analogize to this Court's capital punishment cases mandating individualized sentencing. Such an analogy is misplaced, however. Justice Powell in his dissent in *Rummel*, 445 US at 301, allowed that, "Of course, the Constitution does not bar mandatory sentences."

In *Lockett v Ohio*, 438 US 586, 604-605 (1978) the plurality opinion makes clear the profound difference between the imposition of death and all other noncapital sentences:

> We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the

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[12] Although a prisoner might technically be eligible for parole after ten years he cannot be paroled if there is a written objection by the sentencing judge, or his successor in office. MCL 791.234(4)(b). Also, for the mandatory life sentences, there is the possibility of a governor's reprieve, commutation or pardon. MCL 791.244.

conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few – and various postconviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.[13]

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[13] Sentencing in noncapital cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes.

This Court's recent decision in *Mistretta v United States*, 488 US ___; 109 S Ct 647 (1989) upheld the limiting by Congress of judicial discretion as to sentencing. In *Walton v Arizona*, 497 US ___; 110 S Ct 3047, 3076 (1990), Justice Blackmun's dissent (joined in by Justices Brennan, Marshall and Stevens), after reiterating the "qualitative difference" between death and all other penalties, pointed out the practical distinction for noncapital sentences:

> In noncapital cases, of course, the States are given broad latitude to sacrifice precision for predictability by imposing determinate sentences and restricting the defendant's ability to present evidence in mitigation or excuse.

In *United States v Belgard*, 894 F2d 1092, 1100 (9th Cir., 1990), the Court explained:

> Belgard also attacks the formulation of the Sentencing Guidelines in the area of probation because they curtail the authority of the district judges to individualize sentences. That attack cannot succeed.
>
> First, the Constitution does not require individualized sentences in non-capital cases. *United States v White*, 869 F2d 822, 825 (5th Cir.), *cert. denied*, ___ US ___, 109 S Ct 3172, (1989). *See also Mistretta*, 488 US at ___, 190 S.Ct. at 650 ("the scope of judicial discretion with respect to a sentence is subject to congressional control"); *Lockett v Ohio*, 438 US 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) ("the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes"). Congress has the power to enact mandatory and determinate sentencing laws and to completely divest the courts of their sentencing discretion, and has exercised this power. *Lockett*, 438 US at 603-05, 98 S Ct at 2965. *See also United States v Grayson*, 438 US 41, 45, 98 S Ct 2610, 2613, 57 L.Ed.2d 582 (1978) (early practice was for Congress to prescribe specific sentence).

For this Court to try to weigh Petitioner's individual characteristics to determine whether his sentence was proper would be fruitless given that there was no extensive development in the trial court of all mitigating and aggravating factors which might have been considered. Such a review would entail even more judicial line-drawing.

E. Solem v Helm Should Be Overruled

As made out in the vigorous dissent in *Solem* by former Chief Justice Burger, joined by Justices White, Rehnquist and O'Connor, the *Solem* majority launched into "uncharted and unchartable waters." 463 US at 314. As Chief Justice Burger concluded:

> The Court's traditional abstention from reviewing sentences of imprisonment to ensure that punishment is "proportionate" to the crime is well founded in history, in prudential considerations, and in traditions of comity. Today's conclusion by five Justices that they are able to say that one offense has less "gravity" than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature. Nor, as this case well illustrates, are we endowed with Solomonic wisdom that permits us to draw principled distinctions between sentences of different length for a chronic "repeater" who has demonstrated that he will not abide by the law. 463 US 314.

The *Solem* proportionality test has been criticized by many as nonobjective and readily manipulable.[13] The gravity of the offense compared to the harshness of the penalty begs the question of proportionality as it suggests no truly objective factors.[14] The *Solem* formulation does not take into account crimes which may not be violent but which society in general believes harmful such as fraud or drug crimes.[15] Applying the *Solem* standard in

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[13] See: Note, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown Of the Solem v Helm Test*, 56 U Chi L R 367, 377 and commentators cited at 377, n. 58.

[14] 56 U Chi L R at 377.

[15] *Id.* at 378-379.

the case at bar reveals the inadequacy of the criteria for weighing the gravity of an offense provided in *Solem*.

Part of the reason Helm's sentence was overturned whereas Rummel's was not may have been that Helm's sentence shocked the conscience. He appeared to be an alcoholic and could not even fully recall his bad-check offense for purposes of providing a factual basis for his guilty plea. Helm pleaded guilty to the habitual charge over his attorney's objection and then waived his right to a presentence investigation and received immediate sentencing. The sentencing judge appeared confused as to whether Helm would be eligible for parole.[16] Petitioner Harmelin concedes his crime was much more serious.

Although in the years since the Court's ruling in *Solem* there have been few reversals of sentences on the basis of the *Solem* standard, the point is that numerous minor sentences had to be reviewed on appeal because *Solem* invited such analysis. *See for example: United States v Sullivan*, 895 F2d 1030 (5th Cir., 1990); *United States v Benefield*, 889 F2d 1061, 1063-1065 (11th Cir., 1989); *United States v Savage*, 888 F2d 528 (7th Cir., 1989) *reh den* 894 F2d 1495 (1989); *State v Elbert*, 125 NH 1; 480 A2d 854, 862 (1984) (Souter, J.).

As noted in *Cabana v Bullock*, 474 US 376, 386 (1986) (plurality), the type of Eighth Amendment proportionality inquiry undertaken in *Solem* involves case-by-case, totality-of-the-circumstances decision-making. Justice Scalia has noted such a test for the appellate judge relegates him or her to the less exalted role of finder of

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[16] 69 Iowa L R *supra* at 777-778.

fact as opposed to determiner of law. This in turn facilitates judicial arbitrariness.[17]

Given the scourge of illegal drugs, the Michigan Legislature's answer to the problem was not disproportionate to the gravity of the crime. *See: United State v Bernal*, 884 F2d 1518, 1520-1521 (1st Cir., 1989); *United States v Martorano*, 866 F2d 62, 69-70 (3rd Cir., 1989) *cert den* ___ US ___; 110 S Ct 1128 (1990); *United States v Aiello*, 864 F2d 257, 265 (2nd Cir., 1988); *United States v Stewart*, 820 F2d 1107, 1108 (9th Cir., 1987) (Kennedy, J.) *cert den* 484 US 867 (1987). In that regard, it is the legislature, composed of elected representatives of the people from a diverse cross-section of the jurisdiction, that is best equipped to draw moral lines and measure public sentiment. It is very difficult to compare crimes that may implicate different societal interests. To not allow deference to the Michigan Legislature's determination of the gravity of drug crimes and the severity of the punishment is to trample on the fundamental concepts of federalism.[18]

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[17] Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L R 1175, 1180-1182 (1989).

[18] 56 U Chi L R at 380-396.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Michigan Court of Appeals and leave intact MCL 333.7403.

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RONALD ALLEN HARMELIN,

Petitioner,

vs.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Michigan

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PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT

I. Individualized Sentencing

Respondent does not adequately address Petitioner's argument that the mandatory aspect of the Michigan statute imposing what amounts to "civil death" is inconsistent with this Court's individual sentencing jurisprudence. Respondent's Brief at 25-27. It is Petitioner's position that what makes this statute unconstitutional is the complete *lack of discretion*, which forces the sentencing judge to impose this uniquely severe penalty, *Solem v Helm*, 463 U.S. 277, 297, 303 n.32 (1983), without an individualized sentencing determination.[1]

Respondent also ignores the fact that the facial harshness of this non-discretionary sentencing law has been exacerbated by the Michigan courts' interpretation of it.[2] First of all, a defendant's prior record is irrelevant under

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[1] Respondent apparently concedes that the application of *Lockett v Ohio*, 438 U.S. 586 (1978), and its progeny to noncapital mandatory minimum sentences is an open question. Respondent's Brief at 26 (citing *Lockett, supra*, 438 U.S. at 605 n.13).

[2] Respondent's Brief at one point implies that the life sentence at issue is parolable. Respondent's Brief at 25, n.12. In fact, Michigan's "lifer law," which provides for eligibility for parole after 10 years, expressly excludes the instant sentence. M.C.L. §791.234(4) ("A prisoner under sentence for life or for a term of years, *other than* prisoners sentenced for life for murder in the first degree and *prisoners sentenced for life or for a minimum term of imprisonment for a major controlled substance offense*, who has served 10 calendar years of the sentence is subject to the jurisdiction of the parole board and may be released on parole . . . ") (emphasis added).

this statute. *See People v Harman*, 124 Mich. App. 93, 103; 333 N.W.2d 591 (1983) (M.J.Kelly, J., dissenting). In addition, a large-scale dealer is treated the same as a mere aider and abetter. *See People v Cortez*, 131 Mich. App. 316, 333-334; 346 N.W.2d 540 (1984).

The purity of the controlled substance is also irrelevant. One who possesses a mixture containing one gram of cocaine and 649 grams of sugar must be sentenced to life without parole, while one who possesses 649 grams of pure cocaine may not be so sentenced.[3] *See People v Lemble*, 103 Mich. App. 220, 223; 303 N.W.2d 191 (1981). Finally, knowledge of the amount has been made irrelevant. If a defendant believed he was transporting one gram of cocaine, and it turns out the amount was over 650 grams, the judge must sentence him to life without parole. *See Cortez, supra*, 131 Mich. App. at 331. Hypothetically, if the next defendant to appear before the same judge was the head of a Medellin drug cartel charged with this statute, he must receive the same sentence as the unwitting defendant mentioned above. Such a result does not comport with this Court's individualized sentencing doctrine under the Eighth Amendment.

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[3] In fact, the defendant who possessed 649 grams of pure cocaine could be sentenced to probation. Under M.C.L. §333.7403(2)(ii), possession of less than 650 but more than 225 grams of a mixture containing cocaine carries a mandatory minimum of 20 years and a maximum of 30 years. Under M.C.L. §333.7403(3), however, "[t]he court may depart from the minimum term of imprisonment authorized under subsection (2)(ii) . . . if the court finds on the record that there are substantial and compelling reasons to do so."

Respondent in its brief assumes, and Petitioner wholeheartedly agrees, that this statute is designed for those who deal in large quantities of drugs. As stated in Respondent's Summary of the Argument: "Drug trafficking is one of the greatest dangers facing the United States. Michigan's mandatory penalty for those dealing in large quantities of drugs is not grossly disproportionate as a weapon in the national war on drugs." Respondent's Brief at 2. The Michigan legislature thus has made a finding that one who is found in possession of 650 or more grams of cocaine at some point is conclusively presumed to be a person who is "dealing in large quantities of drugs." The fact proven (possession of 650 or more grams at some point), however, does not provide a rational connection to the ultimate fact presumed (dealing in large quantities of drugs). This Court has consistently struck down these kinds of presumptions where there is no rational connection between the fact proven and the ultimate fact presumed. *See Leary v United States*, 395 U.S. 6, 30-53 (1969); *Tot v United States*, 319 U.S. 463 (1943). In fact, Petitioner's case is even stronger because in the above cases the presumption was rebuttable.

II. Newspaper Articles

In its brief Respondent cites to various articles from Detroit newspapers.[4] Respondent cites these articles in

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[4] Petitioner has filed a motion to strike Respondent's citation in its Statement of the Case to one newspaper article on the ground that it is improperly prejudicial. Respondent's Brief at 1, n.1. Petitioner has not so challenged Respondent's citations to two other newspaper articles cited in its Argument. Respondent's Brief at 20, nn. 8 and 9.

support of its arguments that drug defendants in general are deserving of mandatory life without parole,[5] and the Petitioner in particular is deserving of such punishment.[6]

Significantly, Respondent fails to cite a three part series of articles from one of the same newspapers, which reported on the operation of Michigan's mandatory life without parole statute. *Detroit Free Press*, March 10, 11, and 12, 1990, at 1A. Among the more pertinent conclusions of the study are: (1) the law has failed in its intent to capture drug "kingpins," instead ensnaring those at the lower levels of distribution[7]; and (2) over half of those sentenced under the statute had no prior felony record.[8]

Respondent repeatedly focuses on the facts of Petitioner's case, virtually ignoring that the instant case also involves a facial challenge to the mandatory aspect of the statute and not merely as applied to Petitioner. A broader, more representative discussion of the people to whom the statute has been applied can be found in the *Detroit Free Press* series of articles cited above.

For example, Ruth Bullock, a 50 year old grandmother with no prior record, is serving life without parole after picking up a friend at the airport whose bags contained cocaine.[9] Kafan Hana, who was 16 years old at the time of his offense, is serving the same sentence after

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[5] Respondent's Brief at 20, nn. 8 and 9 (citing *Detroit Free Press* articles).

[6] Respondent's Brief at 1, n.1 (citing *Detroit News* article).

[7] *Detroit Free Press*, March 10, 1990, at 1A.

[8] *Detroit Free Press*, March 11, 1990, at 7E.

[9] *Detroit Free Press*, March 10, 1990, at 4A-5A.

cocaine was found in his possession.[10] Petitioner agrees that many drug dealers deserve very harsh sentences. That decision, however, should be for the sentencing judge in the exercise of his discretion. As the above examples graphically illustrate, Michigan's *mandatory* statute sweeps with too broad a brush and therefore constitutes cruel and unusual punishment.

CONCLUSION

For the reasons set forth in Petitioner's Brief on the merits, as well as this Reply Brief, this Court should reverse the judgment of the Michigan Court of Appeals and remand for further proceedings.

Respectfully submitted,

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[10] *Detroit Free Press*, March 12, 1990, at 4A. Hana's attorney was quoted in the article as follows:

> "That law was meant to apply to kingpins and prosecutors were supposed to use discretion as to apply it to only certain defendants. There are different tiers and levels. Show me any kingpins that are caught? The kingpins run over to the federal building and give up someone in Miami and get seven years."

(8)

No. 89-7272

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD ALLEN HARMELIN, PETITIONER

v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a statutorily mandated sentence of life imprisonment without possibility of parole imposed on petitioner for possession of approximately 1.5 pounds of cocaine constitutes cruel and unusual punishment under the Eighth Amendment.

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Act of Mar. 28, 1990, ch. 244, 1990 Wash. Legis. Serv. 244 (West) 19
Act of Mar. 30, 1990, ch. 268, 1990 Idaho Sess. Laws ch. 268 (Westlaw) 18
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Ark. Stat. Ann. § 5-64-401(a)(1)(i) (1987) 19
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Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839 (1969) 24

1 T. Macaulay, *History of England* (1850) 24

McFarland, *Drug Abuse Indicators Trend Report—Washington, D.C.*, in Community Epidemiology Work Group, U.S. Dep't of Human Services, *Epidemiologic Trends in Drug Abuse* (June 1989) 15

National Inst. of Justice, *1989 Drug Use Forecasting Annual Report* (June 1990) 15

National Inst. on Drug Abuse, U.S. Dep't of Health and Human Services, *Data from the Drug Abuse Warning Network, Semiannual Report Trend Data* (1990) 15, 16

Office of Justice Programs, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 1985* (July 1990) 15

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-7272

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v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case raises the question whether a mandatory sentence of life imprisonment without parole, imposed upon an individual convicted of possessing a large quantity of drugs, constitutes cruel and unusual punishment. A number of federal criminal statutes require that a convicted defendant be sentenced to a term of life imprisonment. See, *e.g.*, 18 U.S.C. 924(c)(1) (second conviction for use of certain firearms during crime of violence or drug trafficking offense); 21 U.S.C. 848(b) (principal leader of continuing drug enterprise with receipts of more than $10 million in a 12-month period); 21 U.S.C. 841(b)(1)(A)

(multiple violations of certain federal drug distribution crimes); 18 U.S.C. 1111 (first degree murder); 18 U.S.C. 1751 (presidential assassination); 18 U.S.C. 1651-1653, 1655, 1661 (piracy). In addition, the Senate has recently passed legislation extending the mandatory punishment of life imprisonment to other crimes.[1] The United States thus has a substantial interest in the constitutionality of mandatory sentences of life imprisonment.

As a result of the complete revision of the federal sentencing system in 1984 (see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976), federal sentences are no longer to be used for the purpose of rehabilitating the defendant (see 28 U.S.C. 994(k)), and parole has been eliminated in favor of determinate sentences. Petitioner and his amici attack both the absence of any rehabilitative rationale underlying the Michigan statute and the employment of mandatory sentencing provisions that reduce or narrowly confine the sentencing court's discretion. Because the federal sentencing system now uses "basically determinate" sentences (see *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989)), and does not authorize sentencing for rehabilitative purposes, the United States has a special interest in those constitutional challenges to the judgment below.

Finally, the federal government is a participant in the nationwide effort to rid our society of the scourge of drug abuse and the violence that follows in its wake. The decision in this case may affect the extent to which the States

[1] The Senate bill, S. 1970, 101st Cong., 1st Sess. (1989) provides a mandatory penalty of life imprisonment for individuals who commit murder while serving a life sentence (§ 106); individuals convicted of certain drug offenses after having been previously convicted of those offenses or of crimes of violence (§ 305); and certain forms of aggravated kidnapping of children under age 18 (§ 1001). See 136 Cong. Rec. S10,184 (daily ed. July 20, 1990).

and the federal government can use severe punishments to deter drug trafficking and remove drug traffickers from the community. The United States has an interest in preserving for Congress and the state legislatures the constitutional authority to use heavy criminal penalties in an effort to achieve those ends.

STATEMENT

1. Petitioner was convicted of possessing more than 650 grams of a mixture containing cocaine. The cocaine was found after petitioner was stopped for a traffic offense. A search by the arresting officers produced ten small plastic bags containing small amounts of cocaine, some larger bags containing a total of 672.5 grams of undiluted cocaine, a gun (for which petitioner had a permit), a telephone pager, $2900 in cash, some marijuana, various pills, and some "drug paraphernalia." J.A. 3, 43-44. Petitioner also had a coded address book in his possession. Br. in Opp. at x.

2. Following his conviction, petitioner was sentenced to life imprisonment without parole under Michigan Comp. Laws Ann. § 333.7403(2)(a)(*i*) (West Supp. 1990).[2] That statute includes a graduated series of penalties for possession of mixtures containing certain drugs, including cocaine. *Id.* § 333.7214(a)(iv). For possession of 50 grams (about 2 ounces) or less of such a mixture, the penalty is up to four years' imprisonment and a fine of up to $25,000. For possession of 50-224 grams (up to about ½ pound), the penalty is between 10 and 20 years' imprisonment. For possession of 225-649 grams (up to about 1½ pounds), the penalty is between 20 and 30 years' imprison-

[2] Petitioner was also convicted of one count of possession of a firearm while commiting a felony (Mich. Comp. Laws Ann. § 750.227b (West Supp. 1990)). He received a two-year term of imprisonment on that count.

ment, and for possession of 650 grams or more, the penalty is life imprisonment without parole. *Id.* § 333.7403(2). See *id.* § 791.234(4) (providing for eligibility for parole after 10 years for persons sentenced to life imprisonment except for those convicted of either first degree murder or a "major controlled substance offense"); *id.* § 791.233b[1](b) (defining "major controlled substance offense" as, *inter alia*, a violation of § 333.7403).

After initially reversing petitioner's conviction on Fourth Amendment grounds, the Michigan Court of Appeals vacated its decision and affirmed petitioner's conviction and sentence. In dismissing petitioner's Eighth Amendment claim, the court simply cited without discussion an earlier decision, *People* v. *Harding*, 163 Mich. App. 298, 413 N.W.2d 777 (1987), vacated on other grounds, 430 Mich. 859, 420 N.W.2d 826 (1988), in which the court had upheld a similar sentence. The Michigan Supreme Court denied leave to appeal. J.A. 52.

3. On May 29, 1990, this Court granted the petition for a writ of certiorari, limiting the grant to Question III in the petition: "whether the mandatory sentence of life imprisonment without possibility of parole constitutes cruel and unusual punishment." 110 S. Ct. 2559; J.A. 53.

SUMMARY OF ARGUMENT

Petitioner's sentence of life imprisonment without parole, though severe, does not violate the Eighth Amendment. In the wake of this Court's decision in *Solem* v. *Helm*, 463 U.S. 277 (1983), which invalidated a life sentence without possibility of parole for a non-violent offense, federal and state courts without exception have held that sentences of life imprisonment may be imposed for serious or violent crimes – including drug-related crimes – committed by adults. Nothing about this case calls for a departure from the unbroken line of post-*Solem* authority.

Petitioner seeks to portray his offense as a non-violent, victimless crime of possession. That characterization is very misleading. The Michigan legislature could properly conclude that possession of 650 grams of cocaine does not constitute possession for personal use, but is clearly indicative of distribution. The Michigan legislature could also reasonably conclude that distribution of drugs is not a victimless crime, but is in fact equivalent to a violent assault both on the users of the drugs and on others who suffer the consequences of their use. Because the legislature could properly decide that the violence caused by unleashing such potent substances on society should be charged to the individuals responsible for their distribution, the sentence imposed on petitioner does not violate the Eighth Amendment.

The fact that Michigan provides a heavier penalty than any other State for a crime such as petitioner's does not render the Michigan statute unconstitutional. Some State will almost always be identifiable as the one that punishes a particular offense most severely; that fact alone does not warrant invalidating a sentence imposed under that State's law. In addition, legislatures mold the criminal law to address new threats to society, and current efforts to control the drug problem by increasing the penalties for drug violations are an important part of that process. In such an evolutionary system, Michigan's severe sanctions for drug-related crimes may well be *more* in accord with the public consensus concerning the gravity of drug-related offenses than are the laws of other jurisdictions that have not been recently amended to reflect changes in public attitudes toward drug trafficking.

Finally, the Eighth Amendment's history indicates particular concern with the unbridled discretion exercised when a judge or jury chooses an extremely severe punishment from a range of authorized options. That, indeed,

was the backdrop of *Solem* itself. This case does not represent a freakish or unintended exercise of sentencing authority by a single sentencing judge or jury. Instead, it reflects a considered decision of the Michigan legislature to apply a mandatory life sentence to all offenders in petitioner's position. That kind of legislative judgment is entitled to great deference by the courts and does not run afoul of the Eighth Amendment.

ARGUMENT

PETITIONER'S SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR POSSESSION OF A LARGE QUANTITY OF COCAINE IS CONSISTENT WITH THE EIGHTH AMENDMENT

In *Solem* v. *Helm*, 463 U.S. 277, 290 (1983), this Court held that "as a matter of principle * * * a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Petitioner asserts that the state court's decision must be reversed because petitioner's sentence was imposed "without consideration of [petitioner's] individual characteristics" (Br. 5) and because the Michigan legislature erred in deciding that drug offenses, concededly "serious crimes" (Br. 7), require the harsh punishment mandated in the statute under which petitioner was sentenced.

1. Petitioner's argument misconceives this Court's holding in *Solem* and the principles governing the review of sentences of imprisonment under the Eighth Amendment. *Solem* did not usher in a reign of strict proportionality review of sentences of imprisonment; the Court held, rather, that a penalty that is "grossly" or "significantly" disproportionate to the crime violates the Eighth Amendment. 463 U.S. at 288, 303. Although the dissenting Justices in *Solem* disagreed vigorously with both the result and much of the analysis employed by the majority,

they agreed that the Eighth Amendment might well foreclose a sentence that is "grossly disproportionate" to the offense, that is, "where reasonable men cannot differ as to the inappropriateness of a punishment." See *Solem*, 463 U.S. at 311 n.3 (Burger, C.J., dissenting); see also *Rummel* v. *Estelle*, 445 U.S. 263, 274 n.11 (1980) ("a proportionality principle [might] come into play * * * if a legislature made overtime parking a felony punishable by life imprisonment"); *Hutto* v. *Davis*, 454 U.S. 370, 374 n.3 (1982) (per curiam) (same). Nonetheless, no member of this Court has suggested—in *Solem*, *Hutto*, *Rummel*, or any other case—that the Eighth Amendment requires individualized, discretionary sentencing in non-capital cases or a precise calibration of crime and punishment. To the contrary, the Court has embraced a set of principles that are fundamentally inconsistent with an exacting "proportionality review" of legislatively mandated penalties.

First, the Court has recognized the primary role of the legislature in determining the appropriate punishment for criminal behavior.[3] The Court noted in *Solem* that "[r]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes." 463 U.S. at 290; see also *id.* at 290 n.16.[4] In other Eighth Amendment cases as well, the Court

[3] Federal criminal law—both in defining crimes and in specifying permissible punishments—is entirely a creature of statute. See *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

[4] The statute at issue in *Solem* made the offender liable to a maximum—not a mandatory—sentence of life imprisonment without parole. See 463 U.S. at 281-282 n.6. Because "a lesser sentence * * * could have been entirely consistent with both the statute and the Eighth Amendment," the Court's decision "d[id] not question the legislature's judgment," but challenged the sentencing court's selection of a penalty at the top of the authorized sentencing range in light of the circumstances of that case. 463 U.S. at 299 n.26.

has expressed its "reluctance to review legislatively mandated terms of imprisonment." *Rummel* v. *Estelle*, 445 U.S. at 274; *Hutto* v. *Davis*, 454 U.S. at 374. Indeed, the Court has made clear that strict judicial review of statutorily mandated penalties would be unfaithful to the respect due to the legislature in classifying criminal behavior and determining to what extent the goals of retribution, deterrence, and rehabilitation ought to be served in meting out punishments. See *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, * * * these are peculiarly questions of legislative policy.").

Second, the Court in *Solem* took special note of "[t]he inherent nature of our federal system" that results, *inter alia*, in "a wide range of constitutional sentences." 463 U.S. at 291 n.17. To state the obvious, particular criminal behavior may affect different States in dramatically different ways, and particular theories of punishment may be effective in, and appeal to the citizens of, some States while lacking either effectiveness or popular support in others. This characteristic of our federal system has long been recognized by the Court. See *Graham* v. *West Virginia*, 224 U.S. 616 (1912); *Rummel* v. *Estelle*, 445 U.S. 263, 282 (1980); cf. *Weems* v. *United States*, 217 U.S. 349, 379 (1910); *id.* at 384-385 (White, J., dissenting). Similarly, some jurisdictions choose to emphasize the deterrent effect of the criminal law with respect to crimes that pose a particular threat to the social order, while in other States deterrence of the same conduct is seen as less important—or less realizable—and milder punishments are imposed based on the need for retribution or rehabilitation. Because given conduct may have different consequences in different States, and because the citizens and legislatures of different States may select different theories of punishment, precise judicial calibration of crimes and their penalties is neither desirable nor constitutionally mandated.

Third, the *Solem* Court held that "objective factors" should govern proportionality review of prison sentences. 463 U.S. at 290. As the plurality noted in *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977), "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." When judgments as to the disproportionality of crime and punishment are based on a particular theory of penology or a judge's personal assessment of the seriousness of a particular offense, those judgments cannot be said to be based on objective factors.

In light of these principles, it is clear that *Solem* did not introduce "a general rule of appellate review of sentences." 463 U.S. at 290 n.16. Rather, as the Court has made clear, the Eighth Amendment forbids only sentences of imprisonment that are "greatly disproportioned," *O'Neil* v. *Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting), "grossly disproportionate," *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977); *Solem*, 463 U.S. at 288; *id.* at 311 n.3 (dissenting opinion), or "significantly disproportionate to [the offender's] crime," *Solem*, 463 U.S. at 303. Consistent with those characterizations, the Court has observed that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *Id.* at 290 n.16. See also *id.* at 289-290 (quoting *Rummel*, 445 U.S. at 272, that "successful challenges to the proportionality of particular sentences [will be] exceedingly rare"). Sentences found to fall within very broad classes of acceptable punishments for categories of criminal behavior are constitutionally permissible.

2. *Solem* itself, and cases following it in the federal and state courts, have made clear that serious crimes, including drug trafficking, may constitutionally result in the imposition of sentences as severe as life imprisonment without parole, the penalty imposed on petitioner. In *Solem*, for example, the Court repeatedly noted that the offender's crime and his previous offenses were "among the less serious offenses" and "relatively minor." *Id.* at 296-297; see also *id.* at 300 ("so minor"). The Court explicitly contrasted such petty offenses with "very serious offenses" such as "a third offense of heroin dealing." *Id.* at 299. Moreover, the Court observed that "[n]o one suggests that [a statute providing for life imprisonment without parole] may not be applied constitutionally to fourth-time heroin dealers or other violent criminals." 463 U S. at 299 n.26.

The lower federal and state courts have had considerable experience since *Solem* in addressing Eighth Amendment challenges to prison sentences. Those courts have recognized that *Solem* does not require state legislatures to apportion crimes and punishments according to a single federal standard. Instead, avoiding reliance on their own subjective values, federal and state courts have without exception reached the conclusion that there is no "gross disproportionality" between a very lengthy prison sentence—with or without parole or clemency—and a serious or violent crime. Petitioner offers no reason for this Court to depart from that uniform line of judicial authority.

a. Although several federal criminal statutes permit or require the imposition of life imprisonment without parole, no federal court has ever held such a sentence to be constitutionally impermissible. Among the sentences that have been upheld are life imprisonment without parole for

participating in a continuing criminal enterprise involving a marijuana smuggling operation, see *United States* v. *Amend*, 791 F.2d 1120 (4th Cir.), cert. denied, 479 U.S. 930 (1986), or a cocaine distribution operation, see *United States* v. *Martorano*, 866 F.2d 62, 69-70 (3d Cir. 1989), cert. denied, 110 S. Ct. 1128 (1990); *United States* v. *Milburn*, 836 F.2d 419, 421-422 (8th Cir.), cert. denied, 487 U.S. 1222 (1988); *United States* v. *McCann*, 835 F.2d 1184, 1187-1190 (6th Cir. 1987), cert. denied, 486 U.S. 1026 (1988), and for possession of a firearm after repeated armed robberies, see *United States* v. *Gourley*, 835 F.2d 249, 252-253 (10th Cir. 1987), cert. denied, 486 U.S. 1010 (1988). In addition, federal courts have upheld extremely long no-parole sentences that in effect constitute sentences of life imprisonment without parole because of their length. See, *e.g.*, *United States* v. *Whitworth*, 856 F.2d 1268 (9th Cir. 1988) (espionage; no eligibility for parole for 60 years), cert. denied, 109 S. Ct. 1541 (1989); *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988) (series of bank robberies; no parole eligibility for 59 years), cert. denied, 488 U.S. 1040 (1989); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986) (second-degree murder; no parole eligibility for 69 years); *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985) (kidnapping involving a homicide; no parole eligibility for 99 years), cert. denied, 475 U.S. 1020 (1986).

b. Lengthy sentences imposed under state law have also been repeatedly upheld as not grossly disproportionate to the offenses charged, especially where the offense involved the use or threat of violence or trafficking in drugs. For example, the defendant in *Seritt* v. *Alabama*, 731 F.2d 728 (11th Cir.), cert. denied, 469 U.S. 1062 (1984), was sentenced to life imprisonment without parole for armed robbery under an habitual offender statute; he had previously pleaded guilty to four violations

of the State's drug control laws and one count of selling controlled substances. 731 F.2d at 730. In upholding the defendant's sentence, the court took special note of the violent nature of his offense, as well as his previous drug convictions. *Id.* at 732, 734. Other courts have similarly held very stiff sentences to be valid when imposed for a violent crime or one involving drug trafficking.[5]

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[5] See, *e.g.*, *Cocio* v. *Bramlett*, 872 F.2d 889 (9th Cir. 1989) (conviction for reckless driving manslaughter committed under the influence of alcohol while on probation for burglary; life imprisonment with no parole for 25 years); *Terrebonne* v. *Butler*, 848 F.2d 500 (5th Cir. 1988) (en banc) (conviction for selling 22 packets of heroin after having been previously convicted of burglary and theft by fraud; life imprisonment without parole), cert. denied, 109 S. Ct. 1140 (1989); *Tuitt* v. *Fair*, 822 F.2d 166, 180-181 (1st Cir.) ("very serious" crime of armed robbery while masked; life imprisonment under habitual offender statute), cert. denied, 484 U.S. 945 (1987); *Chandler* v. *Jones*, 813 F.2d 773, 778-780 (6th Cir. 1987) (third degree burglary after two other felonies; sentence of life imprisonment); *McLester* v. *Smith*, 802 F.2d 1330, 1333 (11th Cir. 1986) (armed robbery conviction after seven previous non-violent burglaries; sentence of life imprisonment without parole held valid); *Holley* v. *Smith*, 792 F.2d 1046 (11th Cir. 1986) (armed robbery conviction after seven previous grand larceny and burglary convictions; sentence to life imprisonment without parole held valid), cert. denied, 481 U.S. 1020 (1987); *Smith* v. *State*, 529 So. 2d 1022, 1025 (Ala. Crim. App. 1987) (armed robbery conviction after four previous nonviolent offenses; sentence to life imprisonment without parole held valid); *State* v. *Hurley*, 154 Ariz. 124, 133, 741 P.2d 257, 266 (1987) (armed robbery after three previous convictions; sentence to life imprisonment with no parole for 75 years), cert. denied, 484 U.S. 1028 (1988); *State* v. *Waits*, 163 Ariz. 216, 786 P.2d 1067 (Ct. App. 1989) (sale of cocaine while on probation for possessory offense; life imprisonment with no parole for 25 years); *Williams* v. *State*, 539 A.2d 164 (Del.) (life imprisonment without parole for third burglary conviction, cert. denied, 488 U.S. 979 (1988); *State* v. *Guzman*, 520 So. 2d 1099 (Ct. App. 1987) (possession of heroin with intent to distribute; life imprisonment with no parole), cert. denied, 521 So. 2d 1183 (La. 1988); *State* v. *Davis*, 310 Md. 611, 623-639, 530 A.2d 1223, 1229-1237 (1987) (life imprisonment without parole for fourth housebreaking conviction); *State* v. *Bonrud*, 393 N.W.2d 785, 792 (S.D. 1986) (first-degree robbery after three prior terms of imprisonment; 45 years' imprisonment with no parole).

c. The principle that legislatures must be accorded very broad discretion in sentencing matters is underscored by the paucity of cases in which otherwise applicable prison sentences have been held invalid on Eighth Amendment grounds. We have found only three such cases since this Court's decision in *Solem*, and none of them involved serious or violent crimes.

In *Clowers* v. *State*, 522 So. 2d 762 (Miss. 1988), the Mississippi Supreme Court held that a trial court had authority under *Solem* to reduce a mandatory sentence of 15 years without parole under a recidivist statute to five years. The offender in *Clowers* had uttered a forged $250 check and had previously been convicted of burglary/larceny and forgery. In another Mississippi case, *Ashley* v. *State*, 538 So. 2d 1181 (Miss. 1989), the court reached a similar result with respect to an individual sentenced to life imprisonment without parole under a recidivist statute. The offender, who had previously been convicted of a number of burglaries and one attempted robbery, had broken into a house to try to find $4 to pay back a grocer for two cans of sardines he had eaten in the store.

Although the rationale of the other case, *State* v. *Gilham*, 48 Ohio App. 3d 293, 549 N.E.2d 555 (Ct. App. 1988), is unclear, it appears that the court invalidated a sentence of six months' imprisonment for possession of a criminal tool—an automobile—because the crime for which the automobile was used as a tool—prostitution or solicitation—was treated as a low-grade misdemeanor and therefore much less harshly under state law. The sentence apparently was not invalidated because of any judgment

that, standing alone, it would have been grossly disproportionate to the offender's crime.[6]

We do not suggest that these three cases were rightly decided. By their exceptional nature, however, they demonstrate that a remarkable consensus has emerged among both state and federal courts that crimes involving or threatening violence may constitutionally be punished by long prison sentences, up to and including life imprisonment without parole. If this Court were to hold that *Solem* forecloses such a term of imprisonment for a crime of violence such as petitioner's, it would apparently be the first court in the Nation to do so.

3. Petitioner seeks to avoid the force of the unbroken line of authority upholding very long prison sentences for violent and drug-related crimes by claiming that his own offense was not violent. As the premise for his argument, he asserts that "a person who commits nonconsensual, violent crimes is more morally culpable than the petitioner in the instant case." Br. 20. That premise, however, suffers from two serious flaws.

First, petitioner's premise is based on the mistaken assumption that a penal code must assign central importance to the moral culpability of the offender. The Eighth Amendment, however, does not enact a particular penological theory. The federal government and the States are constitutionally free to base their criminal codes on other goals, such as deterrence or rehabilitation. A State that bases its sentencing system on those goals may well depart substantially from a scale of punishments based purely on moral culpability. Nothing in *Solem*—or in any of this

[6] In *Naovarath* v. *State*, 779 P.2d 944 (Nev. 1989), the Nevada Supreme Court relied on both the federal and Nevada constitutions to strike down a sentence of life imprisonment without parole imposed on a 13-year-old boy who killed and then robbed an individual who had repeatedly molested him.

Court's Eighth Amendment cases—imposes the kind of straitjacket on state sentencing procedures that petitioner urges.

Second, the crime of which petitioner was convicted *is*, upon analysis, properly viewed as a violent crime. For instance, a 1985 statistical compilation indicates that 38.4% of those convicted of violent offenses nationwide had a history of drug use. Office of Justice Programs, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 1985*, at 36 (July 1990). For the 12 months ending March 31, 1989, 66-75% of all individuals arrested and charged with major criminal offenses in Washington, D.C., tested positive for cocaine. McFarland, *Drug Abuse Indicators Trend Report—Washington, D.C.*, in Community Epidemiology Work Group, U.S. Dep't of Human Services, *Epidemiologic Trends in Drug Abuse* II-266, at II-269 (June 1989). In 1988, of the city's 373 homicides, approximately 60% were attributed to drugs. *Ibid.* And in 1989, 57% of a national sample of males arrested for homicide tested positive for drugs; the comparable statistics for assault, robbery, and weapons crimes were 55%, 73%, and 63%. National Inst. of Justice, *1989 Drug Use Forecasting Annual Report* 9 (June 1990). See generally Goldstein, *Drugs and Violent Crime*, in *Pathways to Criminal Violence* 16, 16-48 (N. Weiner & M. Wolfgang ed. 1989).

Not only is there a direct nexus between drugs and violence, but drug abuse has contributed to enormous physical pain and suffering, as well as death. In Detroit, for example, in the first six months of 1989, a recent survey found that there were 121 deaths in which drugs were a contributing factor—excluding drug-related homicides. National Inst. on Drug Abuse, U.S. Dep't of Health and Human Services, *Data from the Drug Abuse Warning Network, Semiannual Report Trend Data* 41 (1990). Cocaine, the drug involved in this case, was a factor in 47 of

those deaths. *Ibid.* In that same period, there were 4,920 hospital emergency-room episodes in Detroit in which drugs were a contributing factor; cocaine was involved in 2,182 of those episodes. *Id.* at 16.

In adjudicating Eighth Amendment challenges to stiff sentences meted out in drug trafficking cases, courts have recognized that those who distribute drugs are ultimately responsible for the violence that their conduct spawns. In *Terrebonne* v. *Butler*, 848 F.2d 500, 504 (5th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1140 (1989), the court made explicit the comparison between drug offenses and other violent crimes:

> Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image—others who create others still, across our land and down our generations, sparing not even the unborn.

See also *United States* v. *Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (noting public's "compelling interest in detecting those who would traffic in deadly drugs for personal profit"); *United States* v. *Martorano*, 866 F.2d 62, 69 (3d Cir. 1989) (characterizing penalty of life imprisonment without parole as "not harsh" in light of "the havoc that the drug trade wreaks on our nation"), cert. denied, 110 S. Ct. 1128 (1990); *Young* v. *Miller*, 883 F.2d 1276, 1283 (6th Cir. 1989) (crime of possession of a large quantity of heroin is "one of the gravest a person can commit today" because "[t]he ripple effect on society of such a large quantity of heroin is staggering to contemplate"), petition for cert. pending, No. 89-6960; *United States* v. *Ortiz*, 742 F.2d 712, 715 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *State* v. *Waits*, 163 Ariz. 216, 786 P.2d 1067, 1070 (Ct. App. 1989).

In sum, as the lower federal and state courts have recognized, drug trafficking causes an enormous amount of violence and injury in our society, and it is reasonable to charge drug traffickers with responsibility for that violence. Drug trafficking crimes—including, as here, possession of much larger quantities than could be intended for personal use—therefore readily fall within the general category of serious and violent crimes for which very lengthy prison sentences may properly be imposed.[7]

4. Petitioner and his amici assert that Michigan imposes the harshest penalties of any State for the criminal conduct in which petitioner engaged. Pet. Br. 42-43; ACLU Amicus Br. 18-19; Crim. Def. Att'ys Amicus Br. 25-26. The fact that Michigan alone imposes such a stiff penalty for possession of the particular quantity of drugs with which petitioner was found does not, however, suggest gross disproportionality.

As this Court has noted, "some State will always bear the distinction of treating particular offenders more seriously than any other State." *Rummel* v. *Estelle*, 445 U.S. 263, 282 (1980). That truism merely reflects the diversity of our federal system; it does not render the penalty illegitimate. *Id.* at 281-282. In particular, where the threat posed by criminal conduct is increasing and the law in many jurisdictions is in a state of flux, the fact that one

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[7] Petitioner concedes that he was trafficking in drugs (see Br. 4, 17, 30), and the record fully supports that concession. He was found with a beeper, a number of plastic bags containing small amounts of cocaine, and a coded address book. In addition, he was found with a large quantity (672.5 grams) of pure cocaine; in the words of the laboratory report, "[n]o dilutents were detected." J.A. 3. The purity of the drug supports an inference that petitioner was operating near the top of the drug distribution pyramid and contradicts petitioner's assertion that "[t]he record contains no details to help a reviewing court discern the level of drug trafficking involved." Br. 17.

State has chosen to punish the conduct very severely may simply testify to that State's foresight in identifying and responding to the problem. Legislative responses may lag substantially behind changes in public attitudes and perceptions. It therefore cannot be assumed that the State with the harshest penalties for particular drug-related criminal conduct has departed from an otherwise clear social consensus concerning the severity of the crime.

Because it is only relatively recently that the problem of drug abuse has been recognized as a grave threat to the social fabric of our communities, the statutes governing drug-related crimes have been rapidly evolving in the direction of stiffer sentences and broader application. The major federal criminal drug abuse provisions demonstrate this evolution. For example, the key federal statute prohibiting possession with intent to distribute a controlled substance, 21 U.S.C. 841, has been amended three times in the past ten years, in 1984, 1986, and 1988. Each amendment stiffened the penalties and increased the range of criminal conduct. See 21 U.S.C. 841 note. Similar changes have occurred in federal statutes governing other drug-related crimes, *e.g.*, 21 U.S.C. 844, 845a, 845b, and 848. The Senate has recently enacted legislation that once again increases sentences and broadens the scope of a number of these statutes. See S. 1970, 101st Cong., 1st Sess. (1989), 136 Cong. Rec. S10,192 (daily ed. July 20, 1990). Numerous States have similarly increased the penalties applicable to drug-related crimes.[8]

[8] In just the first six months of 1990, at least six state legislatures enacted statutes to broaden the scope of and increase the penalty provisions for drug-related crimes. Act of Mar. 30, 1990, 1990 Idaho Sess. Laws ch. 268 (Westlaw); Act of Mar. 20, 1990, Pub. L. No. 166-1990, 1990 Ind. Acts, 1990 Ind. Legis. Serv. P.L. 166-1990 (West); Act of Feb. 28, 1990, 1990 N.M. Laws ch. 33 (Westlaw); Act of Feb. 28, 1990, ch. 19, 1990 N.M. Laws ch. 19 (Westlaw); Act of May 18, 1990, ch. 220, 1990 Okla. Sess. Law Serv. 220 (West); Act of Feb. 23, 1990, 1990 S.D. Laws H.B. 1374 (Westlaw); Act of Mar. 28, 1990, ch. 244, 1990 Wash. Legis. Serv. 244 (West).

Beyond that, in arguing that Michigan's penalty scheme stands alone, petitioner defines the applicable categories too narrowly. Because the State's prohibition of possession of amounts of cocaine in excess of 650 grams is obviously not directed at simple possession of drugs for personal use, the Michigan penalty is more analogous to penalties imposed in other jurisdictions for distribution or possession with intent to distribute. Moreover, Michigan's choice of 650 grams of cocaine as the triggering amount for a high-volume drug offense does not render irrelevant other States' statutes that use somewhat higher quantities as the triggering amounts for very long terms of imprisonment. These distinctions, as this Court noted in *Rummel*, "are subtle rather than gross." 445 U.S. at 279. Viewing Michigan's statute as providing for a mandatory term of life imprisonment for possession with intent to distribute a large quantity of a dangerous drug, Michigan's statute is not radically different from the statutes of a number of other States.[9] Thus, even if Michigan's penalty provision is

[9] Although only Alabama has joined Michigan in penalizing large-volume first-offense drug offenders with a mandatory term of life imprisonment without parole (see Ala. Code § 13-A-12-231(2)d (Supp. 1989) (life imprisonment without parole for offense involving more than 10 kilograms of cocaine)), a number of States subject first-time drug offenders to life imprisonment for large-scale drug offenses, and many of those States impose long mandatory minimum sentences. See, *e.g.*, Ark. Stat. Ann. § 5-64-401(a)(1)(i) (1987) (40 years to life); Conn. Gen. Stat. § 21a-278(a) (Supp. 1990) (5 years to life); Fla. Stat. Ann. § 893.135(1)(b)(3) (West Supp. 1990) (15 years to life); Idaho Code § 37-2732(a)(1)(A) (Supp. 1990) (up to life); Mo. Rev. Stat. § 195.222.2(2) (Supp. 1990) (10 years to life); Mont. Code Ann. § 45-9-101(2) (Supp. 1990) (2 years to life); Nev. Rev. Stat. § 453.3385 (1985) (25 years to life); N.Y. Penal Law § 220.21 (McKinney 1989) (15 years to life); N.C. Gen. Stat. § 90-95(h)(3)(c) (1989) (35 years to life);

more severe than the roughly parallel provisions in other States, that disparity does not render Michigan's penalty " 'grossly disproportionate' * * * to the punishment [petitioner] would have received in the other States." *Id.* at 281.

In conducting a disproportionality analysis, the Court in *Solem* also suggested that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction." 463 U.S. at 291. That inquiry appears principally designed to respond to a freakish sentence that may be imposed by a particular sentencing body and is inexplicably at odds with sentences imposed on other, similarly situated defendants in the same jurisdiction. See *Enmund* v. *Florida*, 458 U.S. 782, 795-796 (1982). To draw constitutionally significant conclusions from a comparison of sentences prescribed for different crimes within the same jurisdiction is much more difficult and constitutes a direct judicial challenge to a considered legislative judgment; it is useful, if at all, only in the most extreme cases. See *Weems* v. *United States*, 217 U.S. at 380-381 (penalty for making a false entry in a public document more severe than penalties for misprison of treason, inciting rebellion, conspiracy to destroy the government by force, some degrees of homicide, forgery, and robbery). The intrusiveness of

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N.D. Cent. Code § 19-03.1-23.1(1)c(2)(b) (Supp. 1989) (life imprisonment with no possibility of parole for 30 years); Okla. Stat. Ann. tit. 63, § 2-401B.1 (West 1984) (5 years to life); R.I. Gen. Laws § 21-28-4.01.2(B) (1989) (20 years to life); Tex. Health & Safety Code Ann. § 481.112(d)(3) (Vernon 1990) (15 to 99 years' imprisonment). See also Ga. Code Ann. § 16-13-31(a)(1)(C) and (f) (Supp. 1989) (mandatory minimum of 25 years' imprisonment; maximum of 30 years); La. Rev. Stat. Ann. § 40.967F(1)(c) (West Supp. 1990) (mandatory minimum of 15 years' imprisonment, maximum of 30 years); S.C. Code Ann. § 44-53-370(e)(2)(e) (Law. Co-op. Supp. 1989) (mandatory minimum of 25 years' imprisonment, maximum of 30 years); Tenn. Code Ann. § 39-17-417(j) (Supp. 1990) (15 to 60 years).

court review of legislative judgments as to the gravity of particular crimes and the need for particular punishments highlights the dangers of mechanically invoking *Solem*'s three-part analysis in a setting where, as here, the legislature has clearly expressed the moral judgment of the community as to the gravity of drug trafficking offenses and the punishment that should be meted out for such profoundly anti-social, destructive conduct.

5. Citing this Court's cases involving the need for individualized sentencing determinations in capital cases, petitioner contends that his sentence is constitutionally defective because it was mandated by statute, rather than being imposed by judges from among a range of legislatively authorized possibilities. Pet. Br. 27. This argument is misguided. Not a single case from this Court has required such individualized sentencing in a non-capital case. Cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). Commenting upon the ultimate nature of the judgment made in the capital sentencing process, the plurality opinion in *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), explained that, although the "prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than constitutional imperative," in capital cases "the fundamental respect for humanity underlying the Eighth Amendment" requires that the sentencing authority be permitted to examine the character of the offense and the offender on an individualized basis. The Court has reiterated that principle time and again since *Woodson*. See, *e.g.*, *Sumner* v. *Shuman*, 483 U.S. 66, 74-76 (1987); *Lockett* v. *Ohio*, 438 U.S. 586, 604-605 (1978) (plurality opinion). Petitioner cites no authority to the contrary.

The Court in *Solem* itself took pains to emphasize that it was not questioning the *legislative* judgment underlying the South Dakota sentencing statute at issue in that case.

See 463 U.S. at 299 n.25. The statute set the *maximum* sentence at life imprisonment, and appears to have set no minimum sentence at all. See 463 U.S. at 282. It was the discretionary decision of the sentencing judge to impose the maximum possible sentence that was ruled unconstitutional in *Solem*. For the Court to set aside the sentence in this case would require it to reject not the judgment of a single sentencing judge, but the considered judgment of the Michigan legislature that persons convicted of a large-scale drug offense should be sentenced to life imprisonment without parole. That kind of legislative judgment is one that this Court has properly refrained from disturbing.[10]

Petitioner's contention that individualized sentencing is imperative in a non-capital context is also at odds with the historical roots of the Eighth Amendment. The principles informing the Eighth Amendment were, in part, aimed at checking arbitrary exercises of discretion, not legislative determinations of appropriate punishment for criminal behavior. See *In re Kemmler*, 136 U.S. 436, 446 (1890) (predecessor to Eighth Amendment in English Bill of Rights "had reference to the acts of the executive and judicial departments of the government of England"); *Weems* v. *United States*, 217 U.S. at 402, 409 (White, J., dissenting). Indeed, all of the early antecedents to the Eighth Amendment discussed in *Solem* involved attempts to check judicial or executive overreaching in a system that gave the sentencing authority vast discretion by today's standards.

[10] The only non-capital case in which this Court has struck down a penalty mandated by a legislature under the Cruel and Unusual Punishments Clause is *Weems* v. *United States*, 217 U.S. 349 (1910). In that case, the Court (speaking through a four-Justice majority) held that the Eighth Amendment was violated by the penalty that the Philippines Code mandated for making a false entry in an official record—a minimum of 12 years' imprisonment at "hard and painful labor," with the prisoner shackled throughout that period and subject to various lifetime civil disabilities. In *Rummel* v. *Estelle*, 445 U.S. at 272-274, the Court noted that the judgment in *Weems* appeared to turn at least in part on the extraordinary nature of the "accessories" to the term of imprisonment.

For example, at the time of Magna Carta, the amount of fines—or "amercements" as they were then called—was left almost entirely to the discretion of the authority imposing the fine. See *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2917-2918 (1989); *id.* at 2927 (O'Connor, J., dissenting). Magna Carta's prohibition of excessive amercements, see *Solem*, 463 U.S. at 284, thus imposed a limit on the arbitrary exercise of power and threatened no statute of general application. As late as Blackstone's time, the amount of fines continued to be discretionary, see 4 Blackstone, *Commentaries on the Laws of England* *372 ("Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine, in general, without specifying the certain sum."). Accordingly, the English Bill of Rights included the limitation on "excessive" fines, which later was incorporated almost verbatim in the Eighth Amendment. *Solem*, 463 U.S. at 285 n.10.[11]

The cases *Solem* relied upon as antecedents to the prohibition on cruel and unusual punishment in the English Bill of Rights likewise involved harsh exercises of discretionary judicial authority. *E.g.*, *Hodges* v. *Humkin*, 2 Bulst. 139, 80 Eng. Rep. 1015 (K.B. 1615); *Earl of Devon's Case*, 11 Harg. State Tr. 133, 136 (1689). Moreover, neither of the two specific events that are often said to have crystallized

[11] The extent and nature of the relationship between the Excessive Fines Clause and the Cruel and Unusual Punishments Clause are not at issue in this case. Cf. *Walton* v. *Arizona*, 110 S. Ct. 3047, 3066 (1990) (Scalia, J., concurring).

English sentiment in favor of a prohibition on cruel and unusual punishment involved legislatively mandated punishments; rather, both involved asserted abuses of delegated authority.[12]

The historical record thus suggests that, contrary to petitioner's contention, the Eighth Amendment is particularly directed at the avoidance of arbitrarily harsh assertions of discretionary authority. To be sure, this value does not exhaust the Eighth Amendment's protection. But petitioner's contention—that the replacement of sentencing discretion with determinate, legislatively sanctioned sentences of imprisonment is particularly suspect under the Eighth Amendment—is untenable in light of the historical record. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989) ("the scope of judicial discretion with respect to a sentence is subject to congressional control"); see also *United States* v. *Brittman*, 872 F.2d 827 (8th Cir.), cert. denied, 110 S. Ct. 184 (1989); *United States* v. *Vizcaino*, 870 F.2d 52, 54-56 (2d Cir. 1989); *United States* v. *Frank*, 864 F.2d 992, 1009-1010 (3d Cir. 1988), cert. denied, 109 S. Ct. 2442 (1989).

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[12] As the Court has explained, the provision in the English Bill of Rights has been viewed as "a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the prejury prosecution of Titus Oates in the same year. In either case, the exclusive concern of the English version was the conduct of judges in enforcing the criminal law." *Ingraham* v. *Wright*, 430 U.S. 651, 664-665 (1977). For a detailed explanation of the case of *Trial of Titus Oates*, 10 How. St. Tr. 1079, 1316 (K.B. 1685), in which extremely severe sentences of life imprisonment, whipping, and accessory punishments were imposed in a politically charged case, see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 856-859 (1969); 1 T. Macaulay, *History of England* 448-453 (1850). For explanations of the "Bloody Assize," see *id.* at 591-612.

CONCLUSION

The judgment of the Court of Appeals of Michigan should be affirmed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RONALD HARMELIN,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Writ of Certiorari to the Michigan Supreme Court

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

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75 pp

QUESTION PRESENTED

IS A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR A FIRST OFFENDER CONVICTED OF POSSESSING OVER 650 GRAMS OF A MIXTURE CONTAINING COCAINE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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INTEREST OF AMICI CURIAE[1]

Criminal Defense Attorneys of Michigan (CDAM) is a statewide, nonprofit organization with several hundred members including all public defenders in the State of Michigan as well as contract defenders and private attorneys. Since its inception in 1976, CDAM has been active in providing continuing legal education for criminal defense lawyers, and in serving as amicus curiae in cases of significance to the criminal jurisprudence of the State of Michigan.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit association of over 6,600 criminal defense attorneys from all 50 states, the District of Columbia, Puerto

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[1]Letters of consent to the filing of this brief have been lodged with the clerk pursuant to Rule 37.3.

Rico and the Virgin Islands. NACDL is dedicated to the equal and just enforcement and application of the criminal laws of the United States and of the Constitution of the United States of America. In the past, NACDL has participated as amicus in a number of cases before the Court involving the interpretation of the Constitution.

Amici Curiae file this brief, to urge this Court to find that the statute mandating the sentence imposed in the instant case fundamentally violates the constitutional protection against cruel and unusual punishment expressed in the Eighth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Ronald Harmelin, a forty-two year old man with no prior criminal convictions, was pulled over by the police for failure to stop at a red light. A subsequent search of his 1977 Ford automobile revealed 672 grams of a mixture containing cocaine and a gun for which Petitioner had a permit. Petitioner was charged with possession of over 650 grams of cocaine in violation of MCL 333.7403(2)(i) and with possession of a gun during the commission of a felony. He was convicted of these charges after a bench trial before the Honorable Gene Schnelz, Judge of Oakland County Circuit Court.

On April 30, 1987, Petitioner was sen

tenced to the only punishment possible under this statute, life in prison without parole.

Petitioner's conviction and sentence were affirmed by the Michigan Court of Appeals on April 18, 1989. People v Harmelin, 176 Mich App 524 (1989). On January 29, 1990 the Michigan Supreme Court denied leave to appeal. People v Harmelin, 434 Mich 863 (1990). Mr. Harmelin filed a petition for a Writ of Certiorari on April 2, 1990. Certiorari was granted on May 29, 1990. This is the brief amicus curiae on behalf of the Criminal Defense Attorneys of Michigan (CDAM) and the National Association of Criminal Defense Lawyers (NACDL).

SUMMARY OF ARGUMENT

This case involves the constitutionality of the mandatory nonparolable life sentence authorized by MCL 333.7401(1)

and (3). Unlike in Rummel v Estelle, 445 US 263 (1980), where this Court found a statute which authorized a punishment of life in prison with the possibility of parole to be constitutional, and comparable to mandatory death penalty statutes struck down by this Court for their failure to permit consideration of mitigating circumstances, the punishment in this case is unconstitutionally cruel and unusual for the reason that it mandates life in prison without parole to everyone convicted of posessing any mixture of 650 grams or more containing cocaine. This result follows regardless of the circumstances of the offense including the quality of the mixture and defendant's knowledge of the quantity of the mixture, and regardless of the individual characteristics of the defendant. Nor is the constitutionality of this statute saved by the

possibility of executive clemency. As this Court held in Solem v Helm, 463 US 277, 303 (1983), reliance on "such a bare possibility would make judicial review under the Eighth Amendment meaningless."

Moreover, the punishment mandated by the Michigan statute is disproportionate to the offense and disproportionate to the punishment authorized by all other comparable state and federal statutes.

ARGUMENT

A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR A FIRST OFFENDER CONVICTED OF POSSESSING OVER 650 GRAMS OF COCAINE IS CRUEL AND UNUSUAL PUNISHMENT.

The mandatory nonparolable life sentence imposed on Mr. Harmelin violates the Eighth Amendment in two respects. The sentence is disproportionate as applied to his individual circumstances

and the statute fails to provide for individualized sentencing.

A. THE SENTENCE IS DISPROPORTIONATE AS APPLIED TO PETITIONER.

The Eighth Amendment proscription against cruel and unusual punishment prohibits not only barbaric and unacceptable modes of punishment, but limits the imposition of excessive sentences for a particular offense. Solem v Helm, 463 US 277 (1983). Because of the extreme and unique nature of the death penalty, this Court has subjected capital sentences to rigorous inquiry. Coker v Georgia, 433 US 584 (1977); Enmund v Georgia, 458 U.S. 782 (1982). The review of prison sentences often involves difficult line drawing and the comparison of terms which because of complex parole and sentence reduction provisions do not lend themselves to a

quantitative analysis. Rummel v Estelle, 445 US 263 (1980). The body of the Eighth Amendment decisions confirms that legislative judgments regarding, the appropriate length of prison sentences must be accorded substantial deference. Hutto v Davis, 454 US 370 (1982).

The analytical difficulties which impede the routine application of the proscription on cruel and unusual punishment to ordinary prison sentences do not exist in the instant case. Among prison sentences, the Michigan statute stands alone as a paragon of harsh and inflexible punishment. The statute does not distinguish between varying levels of individual culpability or prior criminal record. Thus, a large-scale dealer with an extensive record is treated the same as a minor participant who is a

first time offender. See People v Harman, 124 Mich App 93, 103, 333 NW2d 591 (1983) (M.J. Kelly, J., dissenting).

The statute requires only a mixture containing a controlled substance; it draws no distinction based on the pruity of the controlled substance. Thus a person convicted of possession of one gram of cocaine mixed in the 649 grams of sugar would be subjected to mandatory life without parole. See People v Lemble, 103 Mich App 220, 223, 303 NW2d 191 (1981). In addition, a defendant, whether he is a principal or an aider and abetter, need not be aware that an amount of at least 650 grams is involved. See People v Cortez, 131 Mich App 316, 331, 346 NW2d 540 (1984).

Upon conviction, the sentencing court and the parole authorities are

powerless to interfere with the legislative mandate of natural life in prison. The Michigan legislature has possessing 650 grams of preemptively determined that every individual convicted of cocaine must, irrespective of mitigating circumstances, be permantly disposed to prison. Deference to legislative authority does not insulate unreasonable sentences from constitutional review. As demonstrated by this Court's decisions, the level of scrutiny must intensify as the penalty increases and as the discretionary range of sentencs narrows. Solem, supra; Furman v Georgia, 408 US 238 (1972).

The Solem court recognized that the principle that punishment should be proportionate to the crime has deep historical roots:

> A principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements" may not be excessive...These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments... . When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional.463 US at 285

Justice Powell, writing for the majority, began his opinion by emphasizing:

> Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional. As the Court noted in Robinson v California, 370 US at 667, 8 LEd2d 758, 82 SCt 1417, a single day in prison may be unconstitutional... 463 US at 290 (emphasis added).

The question to be addressed in an Eighth Amendment analysis is whether the sentence is proportionate to the crime for which the defendant has been convicted.

The Solem court explained that the proportionality analysis should focus on objective criteria, including the following:

1. The gravity of the offense and the harshness of the penalty.

2. Sentences imposed on other criminals in the same jurisdiction.

3. Sentences imposed for commission of the same crime in other jurisdictions. 463 US at 292

The question specifically before this Court, then, is whether a non-parolable, mandatory life sentence for possession of more than 650 grams of a mixture containing cocaine when applied to a first offender is proportionate to the crime.

This Court first addressed a mandatory life sentence in an Eighth Amendment context in Rummel v Estelle, 445 US 263 (1980). The defendant was a third felony offender who, under the Texas habitual offender statute, had been sentenced to life in prison. This Court accorded great deference to the Texas legislature's determination that repeat offenders, even those convicted of petty crimes, should be treated more harshly than a first offender. In upholding the sentence, this Court stressed that while Petitioner had no enforceable right to parole under the sentence, parole was an established variation on imprisonment. Therefore a proper evaluation of whether the sentence constituted cruel and unusual punishment could not be recognition that the petitioner would not

actually be imprisoned for the rest of his life. This Court then held that a sentence of life with the possibility of parole for an habitual offender was not so grossly disproportionate to the crime and therefore was not cruel and unusual punishment. Significant to the decision was the recidivist statute's goal of identifying individuals whose criminal history demonstrates that he refuses to conform to societal standards.

In Solem, supra, this Court addressed for the first time a penalty, similar to the instant one, of life without parole. In Solem the defendant was convicted of a seventh non-violent felony under South Dakota's habitual offender law, and sentenced to life without parole. The majority acknowledged that three years earlier in Rummel v

Estelle, supra, this Court had indicated that an argument could be made that the length of a sentence is a matter purely of legislative prerogative unconstrained by the Constitution. This Court then proceeded to reject South Dakota's assertion that its statutory scheme was beyond Eighth Amendment scrutiny. The Court recognized that it would be wholly illogical to subject the punishments of fines and death to a proportionality analysis but not the punishment of imprisonment.

> There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment...It would be anomalous indeed if the lesser punishment for a fine and the greater punishment of a death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is

also no historical support for such an exception. 463 U.S. at 288-289 (footnote omitted).

The Solem court concluded that a sentence of life without parole for a seventh non-violent felony constituted cruel and unusual punishment under the Eighth Amendment.

Application of the objective criteria employed by the Solem court to the sentence at issue, exposes the punishment as cruel and unusual. The only other Michigan offense mandating a minimum sentence of life imprisonment without parole is first-degree murder. MCL 750.316; MCL 791.234(4). This heinous crime is easily distinguishable from Defendant's offense because it involves the loss of life. Other distinctions include the violent nature of the crime, the immediacy of the harm, and the absence of participation by the victims.

Comparisons between crimes are difficult, but there are many nonconsensual, violent crimes that draw lesser sentences. Among the many offenses are second-degree murder, MCL 750.317 (life or any term of years); Kidnapping, MCLA 750.349 (life or any term of years); riminal sexual conduct in the first-degree, MCLA 750.520(b) (life or any term of years). In each of these offenses, the legislature has allowed the courts to exercise discretion in sentencing. None of them carries a mandatory sentence nor do they preclude parole.

The classification of possession of more than 650 grams of a substance containing cocaine as equivalent to first-degree murder but more serious than second-degree murder for the purposes of sentencing defies logic and rationality.

Amici fully recognize the extent of the drug abuse problem in modern society. Nevertheless, the severity of a drug possession offense cannot in fairness be considered, in all cases, to exceed intentional homicides. The irony of this statute is that, had Petitioner panicked at the traffic stop, unpremeditatedly shot and killed the two police officers, dumped the cocaine, and then been arrested, he would have been subject to a sentence of any term of years up to life and on a life sentence would be eligible for parole in ten years. MCL 791.234(4) In addition, on a sentence calling for a term of years Petitioner would be

eligible for disciplinary credits, MCL 800.33(5) (1979).[2]

The necessary fact of a death of a human being, absent any mitigating or justifying circumstances, must make first-degree murder the most serious known to the law. This principle was expressed by the United States Supreme Court in Coker v Georgia, supra, 433 U.S. at 597-598, which held that the Eighth Amendment bars a state legislature from imposing the death penalty for a rape conviction. While the Coker decision concerned the death penalty the

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2. The Michigan Supreme Court recently held that where a defendant is sentenced to a term of years, the minimum cannot exceed his life expectancy. People v Moore 432 Mich 311 (1989)

Court's rationale is applicable to the instant case.

> "Rape is without doubt deserving of serious punishment; but in terms of moral deparvity and the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." 433 US at 598

In the context of the present case, the offense of possession of more than 650 grams of a substance contaning cocaine can be substituted for rape in the reasoning of the Coker court. In terms of "moral depravity" and "injury to the person and to the public," it does not compare to first-degree murder. It cannot be denied that the potential of a death exists from the possession, use, or delivery of a controlled substance, either from ingestion of the drug or from violence related to the business of

drug dealing. In this sense an argument could be made that possession of a large quantity of a Schedule 1 substance, or cocaine, is the equivalent to disregard of the risk of death with knowledge that death or great bodily harm could result from that act. This argument, however, only supports an equivalency comparison between the drug offense and second-degree murder under Michigan law.

All other life sentence offenses in Michigan permit the exercise of some judicial discretion. A sentence is more likely to be proportionate to the crime if the trial judge is allowed to take into account mitigating circumstances in the offense, the defendant's individual characteristics, and the defendant's prior record.

A significant consideration in comparing the harshness of the penalty to the severity of the offense is the fact that the sentence at issue is not subject to parole. The only potential avenue for release under the present sentence is commutation by the governor. MCL 791.244.

The distinction between the availability of parole and the potential of commutation is crucial to a review of the effect of a particular sentence for purposes of a Eighth Amendment analysis. In Solem, this Court emphasized the difference between parole eligibility and the possibility of executive commutation:

> Helm's present sentence is life imprisonment without possibility of parole. Barring executive

> clemency, see infra, at 300-303, 77 LEd2d, at 655-657, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v Estelle. Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily. (Empahsis added)
>
> ***
>
> The possibility of commutation is nothing more than hope for 'an ad hoc exercise of clemency.' It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eight Amendment meaningless. 463 U.S. at 297, 303 (footnote omitted) (emphasis added).

Indeed, Michigan's present governor, James Blanchard, has pardoned only one

inmate in seven years.[3]

Thus under discretionary life sentences in Michigan, which are subject to MCL 791.234(4), the "lifer law," which provides for the possibility of parole after 10 years, it is possible to generally predict, given the statutory procedures, when a parole might be granted. As to commutation, it is impossible to predict if or when it will occur. The non-parolable aspect of the instant statute further evidences both its

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3. The drug statute under analysis was enacted in 1978. No one serving time under it has been pardoned. The statistics on pardons are provided by William J. Hudson, Chairperson of the Parole Board, Michigan Department of Corrections, October 16, 1989.

excessiveness in relation to the offense and its disparity from the sentences permitted for other serious offenses within Michigan.

A third criterion under the proportionality test set forth in Solem v Helm, supra, is a comparison of the sentence imposed for commission of the same crime in other jurisdictions. In Helm, this Court noted that only one other state, Nevada, allows the imposition of a sentence of life without parole for repeat offenders.

Out of 50 states and the District of Columbia, only Michigan authorizes a mandatory sentence of life imprisonment without parole for possession of cocaine, regardless of any other characteristics of the offense or of the individual defendant. Only 10 states --

Connecticut, Idaho, Kansas, Montana, Norta Dakota, Neveda, Oklahoma, Rhode Island, Tennessee, and Texas -- provide for a possible life sentence for first offenders. But these states do not preclude the possibility of parole, nor considerable exercise of discretion by the sentencing judge. Missouri does punish trafficking, an offense more reprehensible than the one at bar, by a non-parolable life sentence. But the sentence is not mandatory. The judge has the discretion to impose a 10 - 30 year sentence. See Appendix for a list of penalties for the comparable offense in other states .

Under federal law, 21 U.S.C. §841(b)(1)(B)(ii) which prohibits possession with intent to deliver 500 grams or more of a mixture containing cocaine,

Petitioner would have received a significantly lighter sentence, even under the "toughened" sentencing guidelines.[4] Under the United States Sentencing Commission Guidelines, Petitioner's offense level would be 26, which provides for a 63 to 78 month sentence. If, however, the sentencing court were to consider Petitioner an organizer, leader, manager, or supervisor of a drug operation,- the sentence could have been enhanced two levels, which provides for a sentence of 78 to 97 months. It should also be noted that a firearm was found in

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4. 21 USC 841(b)(1)(B)(ii) mandates a minimum sentence of 5 years and a maximum sentencing of 40 years with a provision for supervised release of at least 4 years after discharge from prison.

Petitioner's car at the time the cocaine was also discovered for which Petitioner had a permit. If one wished, however, to enhance his sentence by arguing that firearm was used in the commission of the offense and couple this enhancement with the enhancement provision for an organizer, leader, manager, or supervisor, the maximum sentence under the guidelines would still only be 97 to 121 months. See United States Sentencing Commission Guidelines, §2D1.1 (November 1, 1987) (November 1, 1989 Amendments to Guidelines).

Under federal law the only possibility of a mandatory minimum of life without parole for a first offender for possession of 500 grams or more of a mixture containing cocaine is under Title 21 USC §848, the continuing

criminal enterprise statute (often referred to as the drug kingpin statute). In order to convict an individual under this statute, a person has to be an organizer, supervisor, or manager of five or more persons, and commit a continuing series of violations; he or she must derive substantial resources from the activities; and it must be shown that the organization grossed at least ten million dollars in any twelve month period, or alternatively, that the organization distributed 150,000 grams of cocaine (over 22 times the amount of cocaine Petitioner had in his possession). The trial court has the authority, however, to reduce the sentence below the statutory mandatory minimum of life without parole under Rule 35 of the Federal Rules of Criminal Procedures, which

allows a reduction below the mandatory minimum based upon substantial cooperation. Under the Michigan statute in question, there is no vehicle for the trial court to depart from the mandatory minimum no matter what the circumstances. The legislative scheme provides for a departure from the mandatory minimum only for quantities less than 650 grams if the trial court finds substantial and compelling reasons. MCL §333.7401 et seq. (West Supp 1990).[5]

Absent a conviction under the

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5. Under the Michigan statutory scheme dealing with the possession, delivery, or manufacture of cocaine the penalties are graduated depending on the amounts. Possession of less than 25 grams carries a sentence of 0-4 years and/or a $25,000 fine. Possession of 25-50 grams carries a penalty of a minimum sentence of 1 year and a maximum sentence of 4 years, or lifetime probation, and/or a $25,000 fine. Delivery of under 50 grams carries a minimum penalty of one year and a

continuing criminal enterprise statute, the only time a first offender can receive life without parole is if aggravating factors resulting in death or

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(continuing)
maximum penalty of 20 years or lifetime probation and up to a $25,000 fine. Delivery or possession of 50 grams but less than 225 grams carries a minimum of 10 years and a maximum of 20 years. Delivery or possession of 225 grams but less than 650 grams carries a minimum sentence of 20 years and a maximum sentence of 30 years. Delivery or possession of 650 grams or more carries a sentence of mandatory life without parole. The trial court may depart from the mandatory minimum provided for the lesser quantities if the trial court finds substantial and compelling reasons. See People v Downey, 183 Mich App 405 (1990).

serious bodily injury are present.[6] Even where death or serious bodily

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6. Under 21 USC 841(b)(1)(B)(ii) a defendant is subject to a mandatory life sentence if he or she has one or more prior convictions and death or severe bodily injury results. In the absence of death or severe bodily injury a second offender is subject to a minimum sentence of 10 years and a maximum sentence of life.

Under 21 USC 841(b)(1)(A)(ii) which prohibits the possession with intent to distribute five or more kilos of a mixture containing cocaine (50,000 grams) a defendant is subject to a mandatory minimum of not less than 10 years or more than life. If death or serios bodily injury occurs the sentence is not less than 20 or more than life. If the defendant has one prior conviction the sentence is not less than 20 nor more than life. If, however, death or serious bodily injury results the defendant faces a mandatory sentence of life. A defendant with two or more prior convictions is also subject to a mandatory minimum of life without parole.

injury is present, however, a sentence is not mandatory; rather, the statute calls for a mandatory minimum of 20 years with a maximum of up to life.

In 1988, the Fifth Circuit found a life without parole sentence constitutional for a Louisiana heroin dealer with two previous felony convictions. Terrebonne v Butler, 848 F2d 500 (5th Cir. 1988). Louisiana's statute however, did not in fact require life without parole. As the Fifth Circuit noted:

> At the time Terrebonne was first sentenced, although the judge had no discretion but to impose such a sentence, he could have either ordered the life sentence enforced or he could have suspended the execution of it, with or without a term of probation. LaRS 40:966(B)(1), as amended by Acts 1973, No. 207 §3; State v Hoplins, 367 So.2d 346 (La. 1979).
>
> In addition, as recognized by the Louisiana Supreme Court in State v Hopkins, supra, under La. Code Crim.

Proc. art. 893, as it read in 1975, the court could have suspended the sentence of even a multiple offender convicted of heroin distribution, if the defendant "intends to participate in the program authorized by the Federal Narcotics Rehabilitation Act or other federal or state rehabilitation programs." 848 F2d at 504 n. 8.

The Sixth Circuit relied on the Terrebonne decision in to reject a constitutional challenge to the instant statute in Young v Miller, 883 F2d 1276 (6th Cir. 1989). The Court's reliance, however, was misplaced and its decision is inconsistent with Solem. The Young court refers to the Louisiana statute as providing for a mandatory non-parolable life sentence. 883 F.2d at 1285. As the above footnote from Terrebonne shows, however,the statute allows for the imposition sentences other than life without parole. Additionally, the defendant in Terrebonne, unlike the

Petitioner, was not a first offender, but had two prior felonies.

In upholding the statutes, however, both the Fifth and Sixth Circuits recognized the severity of the sentences

> In this case, we...believe that the tiger trap may have sprung upon a sick kitten. We are not at all convinced that petitioner Young is the type of "King pin" drug dealer which the Michigan legislature has properly targeted for its harshest penalty. Young v Miller, supra, p 1285.

A comparison of foreign jurisdictions also demonstrates that the penalty is disproportionate to the offense. In Smith v the Queen, 34 C.C.C. (3d) 97 (1987) the Supreme Court of Canada in a 5 - 1 majority opinion held unconstitutional a section of Canada's Narcotic Control Act which provided for a minimum sentence of seven years imprisonment. As did this Court, the Canadian Supreme

Court engaged in a proportionality analysis to determine whether the minimum - ntence was cruel and unusual punishment. The Canadian Supreme Court's analysis allowed for comparative examination of foreign law including international human rights documents, English and American legal history, analogies to death penalty cases, and, in particular, this Court's opinion in Solem, 463 US 277 (1983).

In Smith appellant had returned to Canada from Bolivia with 7 1/2 ounces (212.62 grams) of almost 90% pure cocaine with a street value of roughly $150,000. He pled guilty to importing a narcotic contrary to §5 of the Narcotic Control Act and was sentenced to 8 years.

The constitutional issue before the Supreme Court of Canada was whether the mandatory minimum sentence infringed or denied the right and guarantee under §12 of the Canadian Charter of Rights and Freedoms against imposition of cruel and unusual treatment or punishment.

In striking down the statute the court found that the mandatory nature of the penalty completely ignored the individual characteristices of the defendant:

> A seven year sentence for drug importation is not per se cruel and unusual. It may very well be deserved and completely appropriate. It is the fact that the seven year sentence must be imposed regardless of the circumstances of the offender that results in its being grossly disproportionate in some cases and therefore cruel and unusual in those particular cases.
>
> The concept of "the fit sentence"...as basic to modern day theories of punishment is

effectively precluded by the mandatory minimum in S5(2). Judicial discretion to impose a shorter sentence if circumstances warrant is foreclosed and the inevitable result is a legislatively ordained grossly disproportionate sentence in some cases. Smith, supra, at 147-148

As this Court noted in Coker v Georgia, 433 US 584, 591-592 (1977), to pass constitutional muster a sentence must make a measurable contribution to the acceptable goals of punishment. Under the instant statute the mandatory nonparolable life sentence fails to make a measurable contribution to the acceptable goals of punishment and instead frustrates societal goals. Just a few of the consequences that stem from life without parole sentence are over crowded prisons, an aging prison population, and

the development of a class of superinmates.[7]

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7. In United States v Gomez, _____ F Supp _____, No. 88-8025 (E.D. Mich Oct. 5, 1989). The court discussed the societal concerns in sentencing a defendant to life in prison without parole. In Gomez, defendant was a Colombian national and was convicted of being a participant in a scheme to smuggle into the United States 576 kilos of cocaine (576,000 grams) and 16,300 pounds of marijuana. The trial court characterized defendant as "a long time, sophisticated drug trafficker with direct connections to the Medellin Cartel." Defendant was the only participant who went to trial and refused to cooperate with the government. At sentencing the government recommended a sentence of life without parole. One of the reasons offered by the government was that under the Michigan statute defendant would have received life without parole for 650 grams. The District Court rejected the government's recommendation and sentenced defendant to two 30-years concurrent terms. The District Court, however, after reflecting on the sentence felt the sentence was too long and sua sponte, reduced the sentence to concurrent 22-year terms.

In an amended sentencing memorandum and order the court discussed its reasons for rejecting a sentence of life without parole. The court first recognized that "[l]ife without parole is the

B. THE STATUTE VIOLATES THE EIGHTH AMENDMENT BECAUSE IT FAILS TO PROVIDE FOR INDIVIDUALIZED SENTENCING

In a series of cases beginning with Gregg v Georgia, 428 US 153 (1976), and its companion cases,[8] this Court has established a constitutional doctrine of individualized sentencing in capital cases. This doctrine requires that the sentencer must consider any relevant mitigating circumstances of the offense and the offender before imposing the death penalty. Lockett v Ohio, 438 US

(CONT.)penultimate sentence" citing Solem v Helm, supra, and that the "sentence should be imposed only for the severest of crimes, and in the rarest of circumstances." Slip op. at p 4.

8. Woodson v North Carolina, 428 US 280 (1976); Roberts (Stanislaus) v Louisiana, 428 US 325 (1976); Proffitt v Florida, 428 US 242 (1976); Jurek v Texas, 428 US 262 (1976).

586, 597-609 (1978) (plurality opinion) (sentencer must not be precluded from considering any aspect of defendant's character or record and any circumstances of the offense)[9]; Eddings v Oklahoma, 455 US 104 (1982) (Lockett adopted by majority; sentencer may not refuse to consider as a matter of law any relevant mitigating evidence); Skipper v South Carolina, 476 US 1 (1986) (exclusion of testimony regarding defendant's good behavior while in jail awaiting trial violated Lockett and Eddings); Hitchcock v Dugger, 481 US 393, (1987) (unanimous opinion) (jury

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9. The Court in Lockett expressly left open the application of Lockett to mandatory, minimum sentences in concapital cases. 438 US at 605 fn 13.

was improperly instructed and judge improperly refused to consider mitigating circumstances not listed in statute); Penry v Lynaugh, ___ US ___, 109 SCt 2934, 2947-2952 (1989) (defendant entitled to jury instruction so that jury could give effect to his mitigating evidence).

Mandatory death penalty statutes of all types, no matter how narrowly drawn, have been struck down by this Court as violative of the Eighth Amendment. Woodson v North Carolina, 428 US 280 (1976); Roberts (Stanislaus) v Louisana, 428 US 325 (1976); Roberts (Harry) v Louisana, 431 US 633 (1977); Sumner v Shuman, 483 US 66 (1987). See discussion of these cases, infra.

Although this Court's prior cases involved capital punishment and the

instant case involves life imprisonment without parole,[10] the rationale of these cases is applicable in both contexts. Like the death penalty, mandatory life imprisonment without parole "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty..." Woodson, supra, 428 US at 304. Indeed, a number of the factors used by this Court in Lockett to distinguish capital and non-capital cases -- e.g., the availability of probation, parole, work

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10. The one significant exception is Solem v Helm, 463 US 277 (1983), which found that a sentence of life imprisonment without parole for a seventh nonviolent felony constituted cruel and unusual punishment. Unlike the instant case the trial court in Solem was not required to impose life without parole. 463 US at 281 n. 6

furloughs -- are also unavailable under Michigan's life without parole statute. Lockett, supra, 438 US at 605. Thus, this Court's capital sentencing decisions should be applied in determining the constitutionality of the instant Statute.[11] In Woodson v North Carolina,

11. See, United States v Perez, 685 F Supp 990, 1002 (W.D. Tex. 1988), cert denied, 110 SCt 1153 (1989), a pre-Mistretta Sentencing Guidelines case wherein Judge Nowlin stated in dicta as follows:

> The Court also finds guidance in Supreme Court decisions which mandate that a sentencing judge or jury cannot be restricted from considering all relevant mitigating circumstances when the death penalty is a possibility. [citing Lockett, Eddings, Skipper, and Hitchcock]. Some distinctions may be appropriate between procedures for capital and noncapital cases because the sentences differ in kind. The Court is of the opinion, however, that the defendant's ability to inform the Court of circumstances and factors unique to him and the Court's ability to consider such factors should not be determined by whether the defendant faces a maximum punishment of death, a life sentence, or a lesser term of incarceration.

this Court struck down a North Carolina statute which provided for a mandatory death penalty for all persons convicted of first degree murder. The Court quoted with approval Justice Black's statement of twenty-seven years earlier that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." Woodson, supra, 428 US at 296-297 (quoting Williams v New York, 337 US 241, 247 (1949)).

In Roberts (Stanislaus) v Louisiana, supra, decided the same day as Woodson, a provision of the Louisiana mandatory death penalty statute defined first-degree murder more narrowly than the North Carolina statute and provided for

automatic jury instructions on lesser included offenses. The Court did not find these differences to be of constitutional significance and again struck down the mandatory death penalty statute, finding the "constitutional vice" of such statutes to be the "lack of focus on the circumstances of the particular offense and the character and propensities of the offender." 428 US at 333.

In Roberts (Harry) v Louisiana, 431 US 633 (1977), the Court addressed a mandatory death penalty provision which was even more narrowly drawn. A different Louisiana provision from that in Stanislaus (Roberts) provided for mandatory death if the murder victim was a police officer performing his lawful duties. Nevertheless, the Court struck

down the provision as an unconstitutional mandatory statute. 431 US at 636-637.

Finally, in 1987 the Court addressed the question which had been expressly left open in previous cases:[12] whether the Eighth Amendment prohibits a statute which provides for a mandatory death penalty as to a prison inmate who murders while serving a sentence of life imprisonment without parole. Sumner v Shuman, 483 US 66 (1987). The Sumner Court, after providing a comprehensive summary of this Court's cases comprising the "individualized capital-sentencing docrtine," 483 US at 73-76, found that

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12. Woodson, 428 US at 287 n 7; Stanislaus Roberts, 428 US at 334 n. 9; Harry Roberts, 431 US at 637 n. 5

even under these extreme circumstances, the Eighth Amendment did not permit a departure from the requirement of individualized sentencing.

Thus this Court has struck down as cruel and unusual punishment every statute which has provided for a mandatory death penalty.[13]

The reasoning behind the Court's

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13. Blystone v Pennsylvania, ___ US ___, 110 SCt 1078 (1990), and Boyde v California, ___ US ___, 110 SCt 1190 (1990) are not to the contrary. In Blystone the Court upheld a statute which provided that if a jury finds at least one aggravating circumstance and finds no mitigating circumstances, then it must impose the death penalty. Similarly, in Boyde the Court upheld a statute which provided that if a jury finds that the aggravating circumstances outweigh the mitigating circumstances, then it must impose the death penalty. Unlike the statutes in Woodson and its progeny, and the Michigan statute in the instant case, the Pennsylvania and California statutes allowed the sentencer to consider any mitigating circumstances and therefore were not impermissibly mandatory.

capital cases applies as well to the Michigan statute providing for mandatory life imprisonment without parole for possession of 650 grams of a mixture containing cocaine. The unique nature of the penalty of life imprisonment without possibility of parole is underscored by this Court's decision in Solem v Helm, 463 US 277 (1983), and a comparison with its predecessor, Rummel v Estelle, 445 US 263 (1980).

In Rummel this Court held that a sentence of life imprisonment (with possibility of parole) under a recidivist statute for a third non-violent felony did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. Three terms later the Court was faced with a similar question: whether a sentence of life

imprisonment (without possibility of parole) for a seventh non-violent felony constituted cruel and unusual punishment. Helm, supra.

The district court in Helm found Rummel dispositive and rejected the defendant's claim, but the Eighth Circuit Court of Appeals reversed. As characterized by this Court, the Eighth Circuit found that "Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabililtation as a goal of the criminal justice system." Helm, supra, 463 U.S. at 283-284 (citing Helm v Solem, 684 F.2d 582 ((8th Cir. 1982).

Over a strong dissent which accused the Court of ignoring controlling

precedent and improperly apply Eighth Amendment concepts from capital cases,[14] this Court affirmed. The Court repeatedly emphasized the lack of possibility of parole in the South Dakota statute and relied exclusively on this factor in distinguishing Rummel. 463 U.S. at 303 n. 32. As stated by the Court:

> Helm's present sentence is life imprisonment without possibility of parole. Barring executive clemency, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v Estelle, Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily. Helm's sentence is the most severe punishment that the State could have

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14. Helm, 463 U.S. at 304 (Burger, C.J., dissenting).

imposed on any criminal for any crime. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

463 U.S. at 297 (citations and footnotes omitted. In light of Helm, the constitutional significance of a life sentence which precludes parole cannot be doubted.

The Michigan statute mandating life without parole for a narcotics offense suffers from the same infirmities as the mandatory statutes in Woodson, the Roberts cases, and Sumner, supra. These statutes could not withstand Eighth Amendment scrutiny because they did not permit individualized consideration of the offender and the offense. See,

Lockett, Eddings, and their progeny, supra.[15]

Similarly, the Michigan statute permits no such individualized consideration. A defendant convicted of possessing 650 grams of a mixture containing cocaine is automatically given the most severe punishment under Michigan law and will ultimately die in

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15. The Judicial Conference of the United States recently submitted a resolution to the United States Congress urging Congress to reconsider the wisdom of statutory mandatory minimum sentences. Report of the Proceedings of the Judicial Conference of the United States, p 16 (Washington, D.C., March 13, 1990). In doing so, the Conference followed resolutions submitted by judges of the Third, Eighth, Ninth, and Tenth Circuits (reprinted in 135 Cong. Rec. S12703-12704 (daily ed. Oct. 5, 1989). In addition, the Federal Courts Study Committee, consisting of fifteen members appointed by the Chief Justice, recently issued its final report recommending repeal of statutory mandatory minimum sentencing provisions. 47 Crim L Rep (BNA) 1057-1059 (April 18, 1990)

prison.[16] The Michigan statute runs contrary to this Court's Eighth

16. Amici do not contend that any statute imposing mandatory life without parole, such as Michigan's first-degree murder statute, Mich. Comp. Laws §750.316 (1979), would be unconstitutional. In contrast to the instant offense, which does not distinguish between degrees of individual culpability, Michigan statutes do distinguish between types of murder, i.e., first and second degree. First-degree murder requires as an element some circumstance (which can be termed "aggravating"), such as premeditation, poison, lying in wait, or felony murder. Only if such an "aggravating circumstance" is proven is the murder defendant sentenced to mandatory life without parole; otherwise the defendant may be sentenced to life (with parole) or any term of years. Mich Comp Laws §750.317 (1979). Thus the complete lack of individualized consideration given to "650" drug defendants is not present with respect to murder defendants. Similarly, the federal drug statutes providing for mandatory life without parole apply only to repeat offenders or drug kingpins who have committed a continuing series of violations under 21 USC §848.

Amendment jurisprudence, in violation of "the principle that punishment should be directly related to the personal culpability of the criminal defendant." Penry v Lynaugh, supra, US , 109 SCt 2934, 2947 (1989). Accordingly, this Court should hold that the penalty of mandatory life imprisonment without parole under Mich Comp Laws §333.7401(3) (1979) constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

Respectfully submitted,

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APPENDIX -la-

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE NO DISCRETION
ALABAMA Code of	13-A211 dist 13-A-212 poss 13A-231 trafficking	2-20 yrs 1-10 yrs 500 - 1,00 g mandatory min - 5 yrs	No
ALASKA	11.71.030	1st time/2-10 yrs 2nd time/4-10 yrs 34d time/6-10 yrs	No
ARIZONA Revised Stats Ann	13-3408 (A)(1) poss (A)(2) poss for sale (A)(7) transport for sale	4 yrs 7 yrs	No
ARKANSAS	82-2601 et seq >400 grams	40 years	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
CALIFORNIA West's Ann	11351 poss for sale 11352 transport, sale give away more than 3 lbs more than 25 lbs more than 100 lbs	2, 3, 4 yrs 3, 6, 9 yrs add 5 yrs add 10 yrs add 15 yrs	No
COLORADO Rev Stats	18.18.105 et seq 28 g or more	4 - 16 yrs mandatory min 4	No
CONNECTICUT Gen Stats Ann	21a278(a) 54-125 one oz of cocaine 1/2 oz free base	minimum 5-20 yrs maximum life	No
DELAWARE Code Ann	16§4751(a) 11§4205	addict -up to 25yrs non-addict -30 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
DISTRICT OF COLUMBIA	33.501 et seq.	4-15 yrs mandatory min of 4 yrs suspended if first offender addict	No
FLORIDA West's Stats Ann	893.01 et seq. manufacture, poss, sale trafficking more than 400 g	0-15 yrs 15 year mandatory minimum	No
GEORGIA Code Ann	16-13-20 et seq. poss poss w/ intent manufacture, bring into state, sell, etc more than 400 g	1st offense 2nd 2-15 yrs 5-30 5-30 yrs life 25 yrs mand minimum	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
HAWAII Rev Stats	329-1 et seq.	0-5 yrs	No
IDAHO Code	32-2732(a)(1)A	up to life/parolable after 10 yrs	No
ILLINOIS S.H.A.	56 1/2 et seq. 400-900 g	not less than 12 yrs nor more than 50 yrs	No
INDIANA Stats Ann	35-48-1-1 more than 3 g	30 yrs	No
IOWA	204.401(1)(a)(b)(2)(a) 500 g - 1,000 g or 5-50 g of crack 21-4501 (penalty)	3-5 yr minimum 10-20 yr max not more than 25 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
KANSAS Stat Ann	65-4101 et seq.	life eligible for parole after 15 yrs (no good time	No
KENTUCKY Rev Stats	218A.010 et seq.	1st offense 5-10 yrs 2nd 10-20 yrs	No
LOUISIANA Rev Stats	40.967(A),(B),(F) more than 400 g	15-30 yrs hard labor parole is precluded for offenses involving crack	No
MAINE Rev Stats Ann	17A§1100 et seq. 17A§1252 more than >13 g	0-10 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
MARYLAND Code	27.286(F)(1) & (3) more than 447 g	0-20 yrs mandatory min of 10 yrs	No
MASSACHUSETTS M.G.L.A.	94C§32A	mandatory min of 1 yr 2 1/2 - 10 yrs	No
MICHIGAN MCLA	333.7401 et seq. manufacture, delivery, poss with intent and poss of more than 650 g	mandatory non-parolable life, no good time, no parole	Yes
MINNESOTA Stats Ann	152.021(1) & (2)	0-30 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
MISSISSIPPI Code	41-29-139(b)(1)	0-30 yrs	No
MISSOURI V.A.M.S.	195.010 et seq. poss distribution trafficking 1st/2nd degree	0-7 yrs 5-15 yrs 10-30 yrs or life, no parole	No
MONTANA Codes Ann	50-32-101 et seq.	2 yrs to life	No
NEBRASKA Rev Stats	28-146(4) & (5) 7 ozs or more	5 yr mandatory min/50 yr max	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
NEVADA Rev Stats	453.011 et seq. 400 grams or more	15 yrs - life parolable after min	No
NEW HAMPSHIRE Rev Stats	318.B:26(1)(a) 5 ozs or more	0-30 yrs possibility of life if habitual drug offender	No
NEW JERSEY Stats Ann	2c:35-5 5 ozs or more 2c:43-6 - 1st degree crime	10-30 yrs/pros can waive mand min	No
NEW MEXICO	30-31-1 et seq.	1st offense 9 yrs 2nd 18 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDFR NON-PAROLABLE LIFE -- NO DISCRETION
NEW YORK Penal Law	220.00 et seq. poss w/intent to deliver sale 1/2 oz sale 2 oz	minimum/maximum 1 yr 7 yrs 3-8 life 15-25 life parolable after min	No
NORTH CAROLINA Gen Stats	90-86 et seq. 28 g - 200 g 200 g - 400 g 400 g or more	7 yrs mand min 14 yrs mand min 35 yrs mand min	No
NORTH DAKOTA C.C.	19-03.1 et seq. 500 g or more	up to life parolable after 30 yrs minus good time	No
OHIO	2925.	1-10 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
OKLAHOMA Stats Ann	63 §2401 et seq. poss w/intent up to deliver possession	5-life suspended for first offender 2-10 yrs; double second offense	No
OREGON Rev Stats	475.992(1)(b) 161.605	10 yrs	No
PENNSYLVANIA Stats	780.101 et seq.	0-15 yrs	No
RHODE ISLAND Gen Laws	21-28-1.01 et seq. 28 g - 1,000 g drug addict more than 1,000 grams	10 yr mand min 30 yrs 20 yrs to life departure allowed	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
SOUTH CAROLINA Code	44-53-110 et seq. 400 g or more	mandatory min of 25-30 yrs	No
SOUTH DAKOTA C.L.	22-42-2	10 yrs - at least 1 yr mandatory min	No
TENNESSEE C.A.	39-6-401 et seq. 30 g or more	10 yrs to life parolable after 19 yrs on life sentence	No
TEXAS Health Code	481.112 400 g or more	15-99 yrs or life parolable after 20 on life sentence	No
UTAH C.A.	5837-8(1)(a)(i)	1-15 yrs	No

STATE	CITATION	PENALTY	FIRST OFFENDER NON-PAROLABLE LIFE -- NO DISCRETION
VERMONT Stats Ann	16 §423 sale of 28 g or more	0-20 yrs	No
VIRGINIA Code	54 §18-2-248	5-40 yrs	No
WASHINGTON West's RCWA	69.50.40(a)(1) 2,000 g or less	0-10 yrs	No
WEST VIRGINIA Code	60A-4-401	1-5 yrs	No
WISCONSIN Stats Ann	161.41(C)(3) more than 30 g	1-15 yrs	No
WYOMING Stats	35-7-1031	0-20 yrs	No

No. 89-7272

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD HARMELIN,

Petitioner,

—v.—

STATE OF MICHIGAN,

Respondent.

ON WRIT OF *CERTIORARI* TO THE COURT OF APPEALS OF MICHIGAN

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MICHIGAN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution, including the prohibition against "cruel and unusual" punishment set forth in the Eighth Amendment.

The ACLU of Michigan is a statewide affiliate of the national organization that has been involved in several challenges to the constitutionality of Section 7403 of the Michigan Controlled Substances Act.[2] That provision, which is now before the Court, imposes a mandatory sentence of life imprisonment without parole for the possession (in designated quantities) of various controlled substances.

This case therefore raises two issues of vital concern to the ACLU. First, *amici* agree with, and urge this Court to reaffirm, its holding that the proportionality of criminal sentences is a proper subject for judicial review under the Eighth Amendment. Second, *amici* believe that Section 7403 violates the Eighth Amendment when judged by the constitutional standards this Court has previously established.

STATEMENT OF THE CASE

Early in the morning of October 12, 1986, Ronald Harmelin was pulled over by two police officers for failing to stop his car at a red light in Oak Park, Michi-

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[1] *Amici* have been informed by counsel that the parties will be filing a "Joint Consent for the Filing of all Briefs *Amicus Curiae*" with the Clerk of the Court.

[2] Mich.Comp. Laws Ann. §333.7403.

gan.[3] He was eventually arrested for possession of marijuana. The arrest led to an "inventory" search of his car and the discovery of 672.5 grams of cocaine in the trunk. Harmelin was then charged with violating Section 7403 of the Michigan Controlled Substances Act, which provides that "[a] person shall not knowingly or intentionally possess a controlled substance . . . ."[4] He was *not* charged with the manufacture or sale of cocaine.[5] Nor was he charged under the section of Michigan law barring possession of a controlled substance "with intent to manufacture or deliver" it.[6]

Both before and after trial, Harmelin argued that the police conduct in his case violated the Fourth Amendment and, thus, that the narcotics uncovered by the police should have been excluded. Following his conviction, Harmelin also argued that Section 7403 violated Eighth Amendment standards by imposing a mandatory sentence of life imprisonment without parole upon any conviction for the possession of more than 650 grams of cocaine.[7]

The Michigan Court of Appeals initially agreed with Harmelin's Fourth Amendment claim and set aside his

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[3] This statement of facts is taken from the first opinion of the Michigan Court of Appeals, which is reprinted as Appendix 1 to the Petition for *Certiorari*.

[4] Cocaine is classified as a controlled substance in Section 7214(a)(iv) of the Michigan Controlled Substances Act. Mich.Comp. Laws Ann. §333.7214(a)(iv).

[5] Those crimes are covered by Section 7401 of the Michigan Controlled Substances Act. Mich.Comp. Laws Ann. §333.7401.

[6] *Id.*

[7] In addition, Harmelin received a mandatory sentence of two years imprisonment under Michigan's felony-firearm statute. Mich.Comp. Laws Ann. §750.227b.

conviction.[8] Upon reconsideration, however, that decision was reversed.[9] Harmelin's Eighth Amendment claim was then rejected in a single sentence that cited as authority a prior decision by the Michigan Court of Appeals.[10] After the Michigan Supreme Court denied leave to appeal,[11] this Court granted *certiorari* solely on the Eighth Amendment question.

SUMMARY OF ARGUMENT

This case involves a simple principle of law that is nonetheless fundamental to any system of justice: the punishment must fit the crime. In the first instance, of course, that judgment rests with the legislature. But, like all legislative judgments, it is subject to constitutional review.

Thus, this Court has consistently recognized that the Eighth Amendment's ban on "cruel and unusual" punishment incorporates the notion of proportionality. In the death penalty context, the relevance of proportionality analysis is now broadly accepted, even if its application in particular cases is still hotly disputed. *See, e.g., Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977). Outside the death penalty context, however, this Court has engaged in a vigorous debate about the propriety of proportionality review. Yet, even those members of the Court who approach such review with the greatest skepticism have acknowledged that some sentences are so out of line with prevailing standards that they cannot be reconciled with

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[8] *See* Appendix 1 to the Petition for *Certiorari*.

[9] *See* Appendix 4 to the Petition for *Certiorari*.

[10] *Id.* at 4-5.

[11] *See* Appendix 5 to the Petition for *Certiorari*.

Eighth Amendment principles. *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

It is difficult to reach any other conclusion. The principle of proportionate sentencing dates back at least as far as the Magna Carta and, while evidence of the framers' intent on this issue is relatively scarce, there is certainly no clear indication in the constitutional debates that the framers meant to depart from this historically endorsed view when they adopted the Eighth Amendment. *Cf. Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, ___, 58 U.S.L.W. 4872, 4881 (June 21, 1990) (Scalia, J., dissenting).

The text of the Eighth Amendment also supports a role for the courts in reviewing legislative sentences. The reference to "cruel and unusual" punishments is admittedly vague, but the ban on "excessive fines" is clear and specific. Nothing in either logic or history supports a distinction between "excessive fines" and excessive imprisonment. Those who argue that the former is a matter of constitutional concern but the latter is not must, at the very least, bear the burden of justifying such a counterintuitive interpretation of the constitutional language. That burden cannot be met.

The real issue, therefore, is how to judge when a sentence becomes "excessive" under the Eighth Amendment. In resolving that question, this Court is not writing on a clean slate. Less than a decade ago, the majority in *Solem v. Helm*, 463 U.S. 277 (1983), adopted a three-part test that weighs the gravity of the offense, the sentence imposed by the same jurisdiction for other crimes, and the sentence imposed by other jurisdictions for the same crime.

That test does not unduly interfere with legislative prerogatives. To the contrary, deference to legislative judgments is built into the *Solem* test. For that reason, perhaps, *amici* have been unable to find a single prison

sentence that has been reversed in the federal courts under the *Solem* standard. The sentence in this case, however, cannot be sustained if *Solem* is to have any meaning at all.

Amici do not discount the gravity of Harmelin's offense, just as this Court did not minimize the seriousness of rape in *Coker v. Georgia*, 428 U.S. at 597-98. But the fact that an offense is serious does not mean that any and all punishments are constitutionally appropriate. In particular, this Court has frequently recognized a bright line distinction between murder and all other crimes. *Id.* at 598. Yet, the only other crime that Michigan punishes by life imprisonment without the possibility of parole is first degree murder. Second degree murder and kidnapping, among many others, are subject to less severe sentences.

The punishment Harmelin received in this case is also grossly disproportionate to what he would have received in virtually every other state in the nation. Here, as in *Solem*, Michigan can point to only one other jurisdiction that would have imposed a similar sentence on the facts of this case. The differences are dramatic in many instances. Under federal law, for example, Harmelin could not have been sentenced to more than one year in jail for possession of 672.5 grams of cocaine.

The Constitution does not require Michigan to endorse the federal government's approach to this problem. At the same time, it does not permit Michigan, or any other state, to subject its citizens to "cruel and unusual" punishment. By any objective measure, that constitutional line has been crossed in this case.

ARGUMENT

I. THE DECISIONS OF THIS COURT FIRMLY ESTABLISH THAT THE POWER OF THE LEGISLATURE TO SET CRIMINAL SENTENCES IS AND MUST BE SUBJECT TO EIGHTH AMENDMENT REVIEW

The legal issues raised by this case are indistinguishable from those decided by this Court in *Solem v. Helm*, 463 U.S. 277. Unless *Solem* is now overruled, its legal principles are therefore controlling. Those principles can be simply stated. First, the Eighth Amendment's ban on "cruel and unusual" punishment incorporates a notion of proportionality. Thus, any criminal sentence that is disproportionate to the offense violates constitutional standards. Second, it is the responsibility of the courts to enforce the relevant constitutional standard by considering: (a) the gravity of the offense; (b) the sentence imposed by the same jurisdiction for other crimes; and (c) the sentence imposed by other jurisdictions for the same crime. *Id.* at 290-92.

This standard does not interfere with legislative prerogatives except insofar as it ensures that those prerogatives are exercised in conformity with the Constitution. Under *Marbury v. Madison*, 5 U.S. 137 (1803), the courts would be shirking their duty if they did anything less. *Amici* recognize that the decision in *Solem* was not without controversy. Nevertheless, it is consistent with a body of case law that dates back to the early days of the twentieth century. It accurately reflects both the constitutional text and constitutional history. And, despite the fears of its detractors, it has not undermined the constitutional validity of legislative sentencing schemes around the country.

Although rarely invoked, *Solem* operates as an important safety valve that can and should be activated in

extreme cases. *Solem* itself was one such case; *amici* believe that this is another.

A. *Solem*'s Requirement Of Proportionate Sentencing Is Consistent With Nearly A Century Of Eighth Amendment Law

The defendant in *Solem* was convicted of uttering a "no account" check for $100 and, without enhancement, would have faced a maximum sentence of five years in prison and a $5000 fine. 463 U.S. at 281. Because of a prior criminal record,[12] however, he was treated as a recidivist under South Dakota law and sentenced to life imprisonment without parole.[13]

In overturning that sentence, this Court relied on a series of decisions, beginning with *Weems v. United States*, 217 U.S. 349 (1910). The *Weems* Court deemed it "a precept of justice that [the] punishment for crime should be graduated and proportioned to [the] offense." *Id.* at 367.[14] Applying that principle to the facts before it, the Court then held that a sentence of fifteen years hard labor in chains was disproportionate to the offense of falsifying public documents. Part of the Court's concern was undoubtedly based on the method of punishment, which bordered on the torturous. But part of the

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[12] His prior criminal record consisted of six convictions for what this Court characterized as "nonviolent felonies," including third degree burglary, obtaining money under false pretenses, and driving while intoxicated. 463 U.S. at 280.

[13] Like the defendant in this case, the defendant in *Solem* was theoretically eligible for a pardon by the governor. 463 U.S. at 282.

[14] The principle that grossly disproportionate sentences violate the Eighth Amendment was first articulated by Justice Field, who dissented in *O'Neill v. Vermont*, 144 U.S. 323 (1892), on the ground that the Eighth Amendment barred "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.* at 339-40.

Court's concern also involved the length of punishment. As the Court noted in *Weems*, a fifteen year sentence was "cruel in its excess of imprisonment." 217 U.S. at 377.

Fifty years later, the Court reached a similar conclusion on very different facts in *Robinson v. California*, 370 U.S. 660 (1962). The defendant in *Robinson* was sentenced to ninety days in jail for being a drug addict.[15] The Court stressed, however, that judgments about proportionality cannot be made in a vacuum. As the Court explained:

> [I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.

Id. at 667.

Following *Robinson*, the question of proportionality has most often arisen in a death penalty context. In *Coker v. Georgia*, 433 U.S. at 592, the Court held that the "sentence of death is grossly disproportionate and excessive punishment for the crime of rape." Likewise, in *Enmund v. Florida*, 458 U.S. 782, the Court held that the crime of felony murder cannot be punished by death unless the state proves beyond a reasonable doubt that the

[15] The holding in *Robinson* rested on Fourteenth Amendment grounds. Its rationale, however, has been incorporated into this Court's Eighth Amendment jurisprudence. *Solem*, 463 U.S. at 287.

defendant intended the murder as well as the predicate felony.[16]

The notion of proportionality review is thus well entrenched in this Court's Eighth Amendment jurisprudence. *Rummel v. Estelle*, 445 U.S. 263, represents the one significant exception in the past eighty years.[17] *Rummel*, of course, has since been superseded by *Solem*. Even *Rummel*, however, did not reject the notion of proportionality entirely. To the contrary, the majority in *Rummel* conceded that "a proportionality principle would . . . come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment." 445 U.S. at 274 n.11.

The hypothetical offered by the *Rummel* majority was obviously intended as an "extreme example." *Id.* Nevertheless, it substantially qualifies the otherwise broad language of the majority opinion. Once the concession is made that some prison sentences would be constitutionally excessive, it is no longer possible to maintain that "the length of the sentence actually imposed is *purely* a matter of legislative prerogative." 445 U.S. at 274 (emphasis added).

Furthermore, the *Rummel* Court's reference to an "extreme example" is, at bottom, not all that much different from this Court's consistent admonition in *Solem* and

[16] Numerous opinions of this Court between *Robinson* and *Enmund* referred to the fact that disproportionate punishment violates the Eighth Amendment. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976)(opinion of Stewart, Powell and Stevens, JJ.); *Hutto v. Davis*, 454 U.S. 370, 374 (1982)(per curiam). Some of those cases have involved the death penalty; others have not.

[17] In *Graham v. West Virginia*, 224 U.S. 616 (1912), the Court rejected a proportionality challenge in a single conclusory sentence that most plausibly rested on the fact that the Eighth Amendment had not yet been applied to the states.

elsewhere that prison sentences should not be overturned unless they are "grossly" disproportionate. No one suggests otherwise. The critical question, therefore, is what criteria to use in determining when the legislature has overstepped its constitutional bounds. *Rummel* proposes no criteria. *Solem* establishes its previously described three part test. In our view, that test is consistent with history and the constitutional text. It also provides a workable standard that judges can and have applied in an objective fashion.

B. The Decision In *Solem* Faithfully Reflects The Constitutional Text And Its Relevant History

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Obviously, the reference to "cruel and unusual" punishment is less specific than the reference to "excessive bail" and "excessive fines." But despite the different phraseology, this Court has had no difficulty concluding that the Amendment, as a whole, was designed to impose "parallel limitations" on bails, fines, and other punishments. *See Ingraham v. Wright*, 430 U.S. at 664. The logic of that position is unassailable. As this Court noted in *Solem*:

> It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of prison were not.

463 U.S. at 289.

At a minimum, the burden should be placed on those who advocate such a counterintuitive interpretation of the constitutional text to establish its historical basis.

In fact, the history surveyed in *Solem* and elsewhere demonstrates that the notion of proportionality was "deeply rooted and frequently repeated" in the common law by 1791. 463 U.S. at 284.

This principle stems at least as far back as the Magna Carta, which established the right against excessive "amercements" or fines in 1215. *Id.*[18] As prison sentences became more common in later years, the English courts were equally insistent that "imprisonment ought always to be according to the quality of the offence." *Hodges v. Humkin*, 80 Eng.Rep. 1015, 1016 (KB 1615). In 1689, the English Bill of Rights adopted the reference to "cruel and unusual" punishment that was repeated verbatim by the framers of the Eighth Amendment. Only three months later, that language was interpreted by the House of Lords, which declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon was excessive and exorbitant, against magna charta, the common right of the subject, and the law of the land." *Earl of Devon's Case*, 11 State Tr. 133, 136 (1689), *quoted in Solem*, 463 U.S. at 285.[19]

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[18] Chapter 20 of the Magna Carta provided that "a free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense . . . ." *Solem*, 463 U.S. at 284 n.9. *See also* Granucci, "'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning," 57 Cal. Law Rev. 839, 844 (1969).

[19] In addition, the Enlightenment philosophers read by the framers argued in favor of proportionate sentencing, including Montesquieu and Beccaria. *See* Schwartz and Wishingard, "The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. U.S. Excessive Punishment Doctrine," 24 Buffalo Law Rev. 783, 811 (1975). The influence of Montesquieu and Beccaria on the framers is generally discussed in B. Bailyn, *The Ideological Origins of the American Revolution* (1967). *See also Ullman v. United States*, 330 U.S. 442, 450 (1956)(Douglas, J. dissenting)("the Italian jurist Beccaria and his French and English followers influenced American thought in the critical years following our Revolution").

The principle of proportionality was also reflected in the colonial laws, which served as the source of many constitutional provisions. The Maryland Charter of 1632, for example, authorized penalties if "the Quality of the offence require it." *See* Perry, *Sources of Our Liberties* 107 (1959). The Massachusetts Body of Liberties of 1641 allowed whipping only if the "crime be very shamefull." *Id.* And the Charter of Rhode Island (1663) explicitly extended proportionality to prison sentences, requiring "the imposing of lawfull and reasonable ffynes, mulcts, and imprisonments . . . ." *Id.* at 173.

Following independence, numerous state constitutions adopted a similar view. The Pennsylvania Constitution of 1776 called for a revision of the penal system to make "punishments in some cases less sanguinary and in general more proportionate to the crime." Pa.Const. §38 (1776). The South Carolina Constitution also advocated reform to make punishments "more proportionate to the crime." S.C.Const. §XL (1776). And the New Hampshire Constitution spelled out at length the rationale for proportionate punishment:

> All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye . . . .

N.H.Const., Bill of Rights, §18 (1783).[20]

There is no reason to believe that the framers of the Eighth Amendment intended to break from this historical tradition when they adopted the constitutional bar on "cruel and unusual" punishments.[21]

C. The Solem Standards Have Proved Eminently Workable And Have Not Produced A Flood Of Litigation

The possibility that *Solem* would "flood the appellate courts with cases in which . . . arbitrary lines must be drawn" has not materialized. *Solem*, 463 at 315 (Burger, C.J., dissenting). In the seven years since the

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[20] *See generally* Schwartz and Wisingard, *supra* n.19, at 819-26.

[21] The dissenters in *Solem* argued that the "cruel and unusual" punishment clause referred only to "prohibiting the kind of torture meted out during the reign of the Stuarts." 463 U.S. at 312. Proponents of this view have principally relied on three statements by the framers. *See, e.g.*, Granucci at 840-42. In the Massachusetts Ratifying Convention in June 1788, Abraham Holmes protested that "there is no constitutional check of punishments but that racks and gibbets may be amongst the most mild instruments of their discipline." 2 J. Elliot, *The Debates In the Several State Conventions on the Adoption of the Federal Constitution* 111 (2d ed. 1881). At the Virginia Ratifying Convention in June 1788, Patrick Henry declared: "What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishments." 3 J. Elliot, *supra*, at 447-48. In the first Congress in 1789, Mr. Livermore objected to the Eighth Amendment on the grounds that "it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off . . . ." 1 *Annals of Cong.* 782-83 (1789).

As Justice Brennan noted in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 260 (1972),"[i]t does not follow [from these three statements] that the framers were exclusively concerned with prohibiting torturous punishments," only that "torturous punishments" were among their concerns. In any event, three isolated statements scarcely diminish from the general thrust of the historical evidence.

Court's ruling in *Solem*, not one prison sentence has been reversed in the federal courts on the basis of the *Solem* standard.[22]

Thus, the federal courts have not "bald[ly] substitut[ed]" their own "subjective moral values for those of the legislature." *Id.* at 314 (Burger, C.J., dissenting). Nor have the courts interpreted *Solem* as a general license to second guess the sentencing judgment of elected legislatures. Rather, the federal courts have demonstrated time and again that they are "capable of applying Eighth Amendment law to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy." *Rummel*, 445 U.S. at 306 (Powell, J., dissenting).

In short, *Solem* established an Eighth Amendment standard that reflects constitutional values and that works in practice. There is no need either to reexamine or to question it. There is, unfortunately, a need to apply it.

II. PETITIONER'S SENTENCE TO LIFE IMPRISONMENT WITHOUT PAROLE SHOULD NOT BE UPHELD UNDER THE *SOLEM* STANDARDS

Petitioner was convicted for possession of 672.5 grams of cocaine. Under Michigan law, the trial judge had no choice but to sentence him to life in prison. This sentence did not depend on a finding that petitioner engaged in the manufacture, sale, or distribution of narcotics. Petitioner was not even charged with such crimes.

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[22] This conclusion is based upon review of all published federal court opinions mentioning *Solem* (116 appellate and 35 district court decisions). *Amici* have been able to find only one case in which *Solem* was cited by a district court to overturn a criminal sentence and that decision was later reversed on appeal. *See Sutton v. State of Md.*, 681 F.Supp. 291 (D.Md. 1988), *rev'd en banc*, 886 F.2d 708 (4th Cir. 1989).

It did not depend on a finding that petitioner is a recidivist, and no such finding was made. Nor did it contemplate petitioner's early release on parole. To the contrary, parole is prohibited under these circumstances.

The severity of petitioner's sentence, therefore, is not a matter for serious dispute. In particular, the absence of even the possibility of parole means that the petitioner here, like the defendant in *Solem*, can expect to "spend the rest of his life in the state penitentiary." 463 U.S. at 297.[23] And while the petitioner here, like the defendant in *Solem*, can seek commutation of his sentence,

> [t]he possibility of commutation is nothing more than hope for "an ad hoc exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

Id. at 303.

The fact that petitioner was *not* sentenced as a recidivist is also relevant in weighing the punishment he received. As this Court explained in *Rummel*, the state's interest in punishing a recidivist is different than its interest in punishing a first time offender:

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[23] By contrast, the defendant in *Rummel* was eligible for parole after serving twelve years of his life sentence, a fact that this Court emphasized in *Solem*. 463 U.S. at 302.

> [A] recidivist [under Texas law] must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail. [The Texas statute] thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole.

445 U.S. at 279 (footnote omitted).

Amici do not suggest that petitioner's crime is in any way comparable to the petty thefts at issue in *Rummel* and *Solem*. It is not. Petitioner was convicted of a serious offense. Nevertheless, the special concerns associated with recidivism cannot be used to justify the punishment imposed in this case. Absent the enhancing factor of recidivism, petitioner's sentence is grossly disproportionate both to the range of sentences imposed by Michigan for other serious crimes and to the sentence that petitioner would have received if convicted of the same crime in virtually every other jurisdiction.

A. Michigan's Sentencing Structure

Life imprisonment without parole is the most severe sentence that any defendant can receive in the state of

Michigan for any crime.[24] In petitioner's case, it was a mandatory sentence.[25] Only two other crimes in Michigan carry a similar penalty: first degree murder,[26] and the manufacture or sale of more than 650 grams of a Schedule 1 or 2 drug.[27] By contrast, second degree murder, kidnapping, and hostage-taking by prisoners carry a minimum sentence of "life or any term of years."[28] Assault with intent to maim is punishable by ten years in prison.[29] Assault with a dangerous weapon is punishable by four years in prison.[30]

Amici fully appreciate the difficulty of placing a moral and penal value on different crimes. At the same time, the Court's Eighth Amendment cases have consistently recognized a bright line between premeditated murder and all other offenses. For example, in *Coker v. Georgia*, 433 U.S. 584, the Court held that rape could not be punished by the death penalty. The Court's holding was clearly not intended to "discount the seriousness of rape," *id.* at 597, just as *amici* do not discount the seriousness of petitioner's conviction in this case. Never-

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[24] Michigan does not have a death penalty.

[25] *See* n.2, *supra*.

[26] Mich.Comp. Laws Ann. §750.316.

[27] Mich.Comp. Laws Ann. §333.7401.

[28] Mich.Comp. Laws Ann. §§750.31, 750.349, 750.349a. The Michigan courts have interpreted the phrase "life or any term of years" to mean a mandatory minimum of one year and one day imprisonment. *People v. West*, 317 N.W.2d 261 (1982); *People v. Harper*, 269 N.W.2d 470 (1979). Furthermore, Michigan law provides that a prisoner "under sentence for life or for a term of years" is eligible for parole after ten years. Mich.Comp. Laws Ann. §791.234(4).

[29] Mich.Comp. Laws Ann. §750.86.

[30] Mich.Comp. Laws Ann. §750.82.

theless, the Court insisted that a distinction between rape and murder was appropriate:

> Rape is without doubt deserving of serious punishment, but in terms of moral depravity and the injury to the person and the public, it does not compare with murder, which does involve the unjustified taking of human life.

Id. at 598.

A similar rationale applies to the facts of this case. Indeed, any other result would be inconsistent with the very premise of proportionate sentencing and, consequently, inconsistent with the demands of the Eighth Amendment.[31]

B. The Practice In Other Jurisdictions

For the Court's convenience, *amici* have compiled a list of the maximum sentence that petitioner could have received had he been tried for the same crime by any other state. *See* Appendix 1a-5a.[32] That list makes clear that Michigan's mandatory sentence of life imprisonment without parole is the harshest in the nation. It is, moreover, the harshest by a considerable margin. Only Alabama imposes a similar punishment. In more than half the states, petitioner could not have been sentenced to more than ten years in jail and in at least two states his maximum sentence would have been six months. Thus, as in *Solem*, the defendant in this case "could not have received such a severe sentence in 48 of the 50 States." 463 U.S. at 299.

The comparison with federal law is even more illuminating. Had petitioner been tried for possession of 672.5 grains of cocaine in federal court, he could not have been sentenced to more than one year in jail, 21 U.S.C. §844(a), and even that sentence is discretionary. As a first offender, petitioner could also have been placed on probation and, upon successful completion of his probationary term, all charges against him would have been dropped. 21 U.S.C. §844(b).[33]

In short, petitioner would probably not be in jail today had he been prosecuted by the federal government. Because he was prosecuted by the state of Michigan, he will never get out of jail for the remainder of his life. These are not simply differences in degree; they are differences in kind. It is one thing to say that the states can act as laboratories in addressing difficult social issues. It is another thing to say that one or two states can impose criminal punishments that are so out of line with the national consensus. Such radical disparities cannot and should not be upheld under the Eighth Amendment.

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[31] There is another significant disproportionality inherent in Michigan's sentencing scheme. Michigan has chosen to punish simple possession of narcotics as severely as it punishes their manufacture or sale (above 50 grams). This produces two complementary results, neither of which can be justified in logic or law. It eliminates any disincentive against drug sales while relieving the state of the necessity of proving an intent to sell.

[32] It is important to note that the Appendix lists the *maximum* possible sentence for each jurisdiction. In Michigan, of course, the maximum sentence is also the mandatory sentence. The mandatory nature of Michigna's sentencing scheme simply ignores "the need for individualized sentencing decisions" that the Court has referred to in its Eighth Amendment opinions. *See Solem*, 463 U.S. at 290 n.17.

[33] Under the federal sentencing guidelines, a first offender found guilty of the more serious crime of possession with intent to distribute 672.5 grams of cocaine, 20 U.S.C. §841(b)(1)(B), would still face only 63-78 months in jail.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

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Dated: August 13, 1990

APPENDIX

STATE-BY-STATE LIST OF MAXIMUM POSSIBLE SENTENCES FOR POSSESSION OF 670 GRAMS OF A MIXTURE CONTAINING COCAINE*

Alabama Ala.Code §§13A-5-6(a)(1), 13A-12-231(2), (10), 13A-12-232 (1982 & Supp. 1989)	life w/o parole
Alaska Alaska Stat. §§11.71.040(a)(3)(A), (d), 12.55.125(e) (Supp. 1988)	5 years
Arizona Ariz.Rev.Stat.Ann. §§13-3408(A)(1), (B)(1), 13-701(c)(3) (1989)	4 years
Arkansas Ark.Stat.Ann. §5-64-401(a)(1)(i), (d) (1987)	life
California Cal. Health & Safety Code §11350(a) (West Supp. 1989); Cal. Penal Code §18 (West 1988)	3 years
Colorado Colo.Rev.Stat. §§18-18-105(1)(a), (2)(a)(I), 18-1-105(1)(a)(IV) (1986)	16 years
Connecticut Conn.Gen.Stat. §21a-279(a) (1989)	7 years

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* *Amici* have listed only maximum sentences to avoid any claim that the *Solem* analysis set forth in this brief has been weighted in petitioner's favor. It is important to note, nonetheless, that the maximum sentence is rarely imposed on first offenders in most jurisdictions. In Michigan, it is mandated by statute.

Delaware Del.Code Ann. tit.16, §4753A(a)(2) (1983), tit.11, §4205(b)(2) (1987)	30 years
District of Columbia D.C. Code Ann. §33-541(d) (1988)	1 year
Florida Fla.Stat.Ann. §§893.13(1)(f), 775.082 (3)(d) (West 1976 & Supp.1990)	5 years
Georgia Ga.Code Ann. §16-13-31(a)(1), (f) (1988)	30 years
Hawaii Haw.Rev.Stat. §§712-1241(1)(a)(ii), (2), 706-659 (1985 & Supp. 1989)	20 years
Idaho Idaho Code §37-2732(c)(1) (1977)	3 years
Illinois Ill.Ann.Stat. ch.56½, ¶1402(a)(2)(C) (Smith-Hurd Supp. 1990)	40 years
Indiana Ind.Code Ann. §§35-48-4-6(a), (b)(1), 35-50-2-6 (Burns 1985 & Supp. 1990)	5 years
Iowa Iowa Code Ann. §§204.401(3), 903.1(1)(b) (West 1987 & Supp. 1990)	1 year
Kansas Kan.Stat.Ann. §§65-4127a(a), 21-4501(c) (1988 & Supp. 1989)	20 years
Kentucky Ky.Rev.Stat.Ann. §§218A.140(2), 218A.990(7) (Baldwin 1982)	5 years

Louisiana La.Rev.Stat.Ann. §40:967(F)(1)(c) (West Supp. 1990)	30 years
Maine Me.Rev.Stat.Ann. tit.17-A, §§1103, 1252(2)(B) (1983 & Supp. 1989)	10 years
Maryland Md.Ann.Code art.27, §287(a), (e) (1987)	4 years
Massachusetts Mass.Gen.Laws Ann. ch.94C, §34 (West 1984)	1 year
Michigan Mich.Comp.Laws Ann. §§333.7403(1), (2)(a)(i), 333.7401(3) (West 1980)	life w/o parole
Minnesota Minn.Stat.Ann. §152.021 (West Supp. 1990)	30 years
Mississippi Miss.Code Ann. §41-29-139(c)(1) (Supp. 1990)	3 years
Missouri Mo.Ann.Stat. §§195.202, 558.011(1)(3) (Vernon 1979 & Supp. 1990)	7 years
Montana Mont.Code Ann. §45-9-102(1), (4) (1989)	5 years
Nebraska Neb.Rev.Stat. §§28-416(3), 28-105(1) (1989)	5 years
Nevada Nev.Rev.Stat.Ann. §453.3395(3) (Michie 1986)	life

New Hampshire N.H.Rev.Stat.Ann. §§318-B:26(II)(a), 651:2(II)(b) (1986 & Supp. 1989)	7 years
New Jersey N.J.Stat.Ann. §§2C:35-10(a)(1), 2C:43-6(a)(3) (West 1982 & Supp. 1990)	5 years
New Mexico N.M.Stat.Ann. §30-31-23(A), (B)(4) (1989)	1 year
New York N.Y. Penal Law §§220.21 (McKinney 1989), 70.00(2)(a) (McKinney 1987)	life
North Carolina N.C.Gen.Stat. §§90-95(h)(3)(c), 14-1.1(a)(4) (1986 & Supp. 1989)	40 years
North Dakota N.D.Cent.Code §§19-03.1-23(3), 12.1-32-01(4) (1985 & Supp. 1989)	5 years
Ohio Ohio Rev.Code Ann. §§2925.03(A)(6), (C)(5), 2929.11(B)(5) (Anderson 1987)	15 years
Oklahoma Okla.Stat.Ann. tit.63, §2-402(A)(1), (B)(1) (West Supp. 1990)	10 years
Oregon Or.Rev.Stat. §§475.992(4)(b), 161.605(3) (1989)	5 years
Pennsylvania Pa.Stat.Ann. tit.35, §780-113(a)(16), (b) (Purdon Supp. 1990)	1 year
Rhode Island R.I.Gen.Laws §21-28-4.01(C)(1)(a) (1989)	3 years

South Carolina S.C.Code Ann. §44-53-370(e)(2)(e) (Law. Co-op. Supp. 1989)	30 years
South Dakota S.D.Codified Laws Ann. §§22-42-5, 22-6-1(7) (1988)	5 years
Tennessee Tenn.Code Ann. §§39-17-418(a), (c), 40-35-11(e)(1) (Supp. 1989)	11 months, 29 days
Texas Tex. Health & Safety Code Ann. §481.115(a), (c), (d)(2) (Vernon 1990)	life
Utah Utah Code Ann. §§58-37-8(2)(a)(i), (b)(ii), 76-3-203(3) (1990)	5 years
Vermont Vt.Stat.Ann. tit.18, §4231(a)[4] (Supp. 1989)	20 years
Virginia Va.Code Ann. §§18.2-250(A)(a), 18.2-10(e) (1988 & Supp. 1990)	10 years
Washington Wash.Rev.Code Ann. §69.50.401(d) (Supp. 1990)	5 years
West Virginia W.Va.Code §60A-4-401(c) (1989)	6 months
Wisconsin Wis.Stat.Ann. §161.41(3m) (West 1989)	1 year
Wyoming Wyo.Stat. §35-7-1031(c) (1988)	6 months

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No. 89-7272

In The
Supreme Court of the United States

October Term, 1990

RONALD HARMELIN,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF AMICUS CURIAE OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

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No. 89-7272

In The
Supreme Court of the United States
October Term, 1990

RONALD HARMELIN,
Petitioner,
v.

STATE OF MICHIGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF AMICUS CURIAE OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Carla J. Johnson, Esq., Counsel for the Petitioner, and Hon. Richard Thompson, Prosecuting Attorney, Oakland County, Michigan, Counsel for Respondent. A Joint Consent of the parties has been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

In this case NDAA speaks as the representative of locally elected prosecuting attorneys in America. Our over 6,500 members are drawn from the body of elected and appointed prosecutors from every state in the United States. Among the programs operated by NDAA for local prosecutors is the National Drug Prosecution Center, Alexandria, Virginia, which seeks to improve the prosecution function in drug cases. The statute in question, and its application in this case, is viewed by the Nation's prosecutors as indispensable to the effective prosecution of drug traffickers.

ARGUMENT

A MANDATORY SENTENCE OF LIFE IMPRISONMENT FOR CONVICTION OF POSSESSION OF MORE THAN 650 GRAMS OF COCAINE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

In this case the Michigan Court of Appeals held, *inter alia,* that a mandatory sentence of life imprisonment for a conviction of possession of more than 650 grams of cocaine did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. *People v. Harmelin,* 176 Mich. App. 525, 440 N.W.2d 75 (Mich. App. 1989), *leave to appeal den.,* 434 Mich. 863 (1990).

Amicus will not duplicate the case law analysis presented by the Respondent in this case, although we agree with it. Instead, we concentrate primarily on issues of policy that concern local prosecutors and we speak from a national perspective.

Although *amicus* believes that this Court's decision in *Solem v. Helm,* 463 U.S. 277, 103 S. Ct. 3001 (1983), as requiring a proportionality review for legislatively determined terms of imprisonment, was wrongly decided, it should be clear in this case that the sentence imposed does not offend the rule adopted in *Solem. Solem* identified three factors for reviewing courts to consider in passing on the proportionality issue in terms of the Eighth Amendment:

(1) The gravity of the offense and the harshness of the punishment;

(2) The sentences imposed on other defendants in the same jurisdiction; and

(3) The sentence imposed for commission of the same crime in other jurisdictions.

To begin with, this Court has made clear in *Mistretta v. United States,* ___ U.S. ___, 109 S. Ct. 647 (1989), that in non-capital cases a proportionality review need not focus on the particular offender (his background, criminal record, prospects for rehabilitation, etc.), but need only address the appropriateness of the legislative choice in establishing a penalty (and the fact that the choice has been made by the legislature, with reduced discretion in the judiciary, does not violate separation of powers principles). Even if the facts concerning the particular offender were relevant to a proportionality analysis in the instant case, however, the Petitioner would be an entirely appropriate subject for the sentence received. The record shows that he not only possessed over 650 grams of cocaine, but that some of it was packaged for resale, he possessed additional narcotics and paraphernalia, and had a beeper with coded instructions to service his narcotics clientele. He was, in short, the typical modern drug dealer, well-equipped to ply his trade. The collective experience of our membership with the havoc wreaked upon Society by drug traffickers argues against any contention that the sentence as imposed was inappropriate in a constitutional sense for this particular defendant.

We believe that the proportionality review required under *Solem* was effectively performed by the Sixth Circuit Court of Appeals in *Young v. Miller,* 883 F.2d 1276 (6th Cir. 1989), when it rejected a similar argument made by a defendant convicted under a similar statute for possession with intent to deliver 650 grams or more of heroin. Although the court in *Young v. Miller* considered the particular circumstances of the defendant in that case, its analysis of the three part *Solem* test as

applicable to the statute is correct. It concluded that "[h]aving analyzed Young's sentence under each of the *Solem* factors, we conclude that her sentence is not so grossly disproportionate to her crimes as to violate the Eighth Amendment." 883 F.2d at 1285.

Other courts have agreed that similar and related mandatory penalty statutes for drug possessors and traffickers were appropriate and constitutional legislative choices, and were properly applied to the defendants in those cases. *See, e.g., United States v. Brown,* 859 F.2d 974 (D.C. Cir. 1988); *United States v. Cook,* 859 F.2d 777 (9th Cir. 1988); *United States v. Zavala-Serra,* 853 F.2d 1512 (9th Cir. 1988); *United States v. Murillo-Guzman,* 845 F.2d 314 (11th Cir. 1988). Perhaps the matter was put best by the Fifth Circuit Court of Appeals in *Terrabonne v. Butler,* 848 F.2d 500 (5th Cir. 1988), when the court, in considering a similar statute, noted:

> Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image--others who create others still, across our land and down our generations, sparing not even the unborn.
> 848 F.2d at 504.

Amicus submits that the legislative choice made by the State of Michigan and applied in this case is not only constitutionally sound but good public policy as well. It is a choice geared to adequately meeting the narcotics trafficking problem of the 1990's, and a choice that prosecutors who are in the front lines of dealing with this problem support. Many states have adopted various forms of mandatory and discretionary life term penalties

for sale, trafficking, and possession of specified large quantities of narcotics. These statutes are collected in the Appendix to this brief. *Amicus curiae* expects that as the success of these statutes in effectively dealing with the narcotics problem becomes apparent, many more states will adopt similar statutes. We respectfully urge this Court to give a clear signal to the state legislatures that this needed response to the scourge of drug trafficking is constitutionally permissible.

For those who argue that a life sentence for possession of over 650 grams of cocaine is constitutionally disproportionate to the crime, we would answer that prosecutors are well aware of the significance of possession of that amount of narcotics and its devastating impact upon Society. As noted by Donald Reisig, Director, State of Michigan Office of Drug Agencies: "I think we have to articulate what 650 grams is. It's a pound and a half, roughly. That's not a small quantity. [...] It's not 20 tons in a warehouse. I understand that. But a pound and a half of cocaine can do immeasurable damage to a society." Castine, "Drug Czar Says Law Fits the Crime," *The Free Press* (Detroit, MI, March 12, 1990, p. A4).

As prosecutors with a national perspective, amicus curiae have seen the effects of similar large quantities of cocaine and related narcotics upon our communities, particularly our youth. We respectfully submit that the effect of such a quantity of narcotics is easily more devastating than a gun in the hand of a murderer. The legislative choice made by the State of Michigan, and its application in this case, does not offend the constitutional mandate of the Eighth Amendment.

CONCLUSION

Amicus curiae submits that the judgment of the court below should be affirmed on the basis of the law and sound judicial policy.

Respectfully submitted,

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APPENDIX

Life Imprisonment for Drug Offenses --
A Selection of State Statutes.

The statutory authority for imposition of life sentences is not uncommon. For example, Alabama, Louisiana, Michigan, and Oklahoma impose mandatory life sentences for particular drug offenses. (See attached list A). Several other states give courts discretion to impose life sentences in specified related circumstances. (See attached list B).

A
Mandatory Life Imprisonment
for
Specified Drug Offenses

Alabama

Drug Offenses ALA. CODE 13A-12-201 to 13A-12-270 (Supp. 1989).

13A-12-231

(1)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 1,000 pounds or more of cannabis "shall be sentenced to a mandatory term of imprisonment of life without parole."

(2)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is in actual or constructive possession of" 10 kilos or more of "cocaine or of any mixture containing cocaine" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(3)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state,

or who is knowingly in actual or constructive possession of" 56 grams or more of "any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(4)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 100,000 capsules or more of "methaqualone" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(5)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 10,000 pills or capsules of hydromorphane "shall be sentenced to a mandatory term of imprisonment of life without parole."

(6)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 10 kilos or more of "3,4 - methylenediaxy amphetamine or of any mixture containing 3,4 -methylenediaxy amphetamine" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(7)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 10 kilos or more of "5-methaxy-3,4- methylenediaxy amphetamine or of any mixture containing 5-methaxy-3,4 methylene-

diaxy amphetamine" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(8)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 56 grams or more of "phencyclidine or any mixture containing phencyclidine" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(9)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 56 grams or more of "lysergic acid diethylamide or any mixture containing lysergic acid diethylamide" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

Louisiana

Controlled Substances Act LA. REV. STAT. ANN. 40:961 to 40:995 (West 1977, Supp. 1990).

966

A. "Except as authorized by this part, it shall be unlawful for any person knowingly or intentionally:
(1) To produce, manufacture, distribute or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance classified in Schedule I;
(2) To create, distribute, or possess with intent to distribute, a counterfeit controlled dangerous substance classified in Schedule I."

B. "Any person who violates Subsection A. with respect to:
(1) A substance classified in Schedule I which is a narcotic drug (all substances in Schedule I preceded by an asterisk) upon conviction shall be sentenced to life imprisonment at hard labor without benefit of probation, or suspension of sentence, and may, in addition, be required to pay a fine of not more than fifteen thousand dollars."

Michigan

Public Health Code. MICH. STAT. ANN. 14.15(7101) to 14.15(7545) (Callaghan Supp. 1987).

14.15(7401)(2)(a)(i)

(1) "Except as authorized by this article, a person shall not manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, a prescription form, an official prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, license, or applicant."

(2) "A person who violates this section as to:
(a) a controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv) and:
(i) which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life."

14.15(7403)

(1) "A person shall not knowingly or intentionally possess a controlled substance, or an official prescription form, or a prescription form unless the controlled substance, official prescription form, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article."

(2) "A person who violates this section as to:
(a) a controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv) and:
(i) which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life."

Oklahoma

Uniform Controlled Dangerous Substances Act. OKLA STAT. tit. 3 [2-101 to 2-608] (West Supp. 1990).

2-415 (Trafficking in Illegal Drug Act)

C.3. "If the person has previously been convicted of two or more violations of this section or any provision of the Uniform Controlled Dangerous Substances Act which constitutes a felony, or a combination of such violations arising out of separate and distinct transactions, life without parole."

"The terms of imprisonment specified in this subsection shall not be subject to statutory provisions for suspension, deferral or probation, or state correctional institution earned credits

occurring from and after November 1, 1989, except for the achievement earned credits authorized by subsection F of Section 1.38 of Title 57 of the Oklahoma Statutes."

B
Possibility of Life Imprisonment
for
Specified Drug Offenses

The following state statutes permit judicial discretion for sentences up to life imprisonment for various acts of sale, trafficking, and possession of narcotics:

Arkansas

Controlled Substances. ARK. CODE ANN. 5-64-101 to 5-64-906 (1987).

Connecticut

Controlled Substances Act. CONN. GEN. STAT. ANN. 21a-240 to 21a-308 (West Supp. 1990).

Florida

Comprehensive Drug Abuse Prevention and Control Act. FLA. STAT. ANN. 893.01 to 893.20 (West Supp. 1990).

Idaho

Controlled Substances. IDAHO CODE 37-2701 to 37-2751 (Supp. 1989).

Montana

Dangerous Drugs. MONT. CODE ANN. 45-9-101 to 45-9-202 (1989).

New Hampshire

Controlled Drug Act. N.H. REV. STAT. ANN. 318-B:1

to 318-B:30 (Supp. 1989).

New Jersey

Controlled Dangerous Substances. N.J. STAT. ANN. 2C:35-1 to 2C:35-23 (West Supp. 1989).

Nevada

Uniform Controlled Substance Act. NEV. REV. STAT. ANN. 453.011 to 453.348 (1986).

Rhode Island

Controlled Substances Act. R.I. GEN. LAWS 21-28-1.01 to 21-28-6.02 (1989).

Texas

Controlled Substances Act. Tex. Health and Safety Code Ann. 481.001 - 481.205 (1990).

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NO. 89-7272

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1990

RONALD ALLEN HARMELIN
Petitioner

v.

THE STATE OF MICHIGAN
Respondent

On Writ Of Certiorari
To the Court of Appeals of Michigan

BRIEF OF PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF THE QUESTION

IS MICHIGAN'S MANDATORY PENALTY OF LIFE IN PRISON WITHOUT PAROLE FOR CERTAIN DRUG OFFENSES INVOLVING OVER 650 GRAMS OF A SUBSTANCE CONTAINING THE DRUG VIOLATIVE OF THE EIGHTH AMENDMENT?

STATEMENT OF THE CASE

Amicus adopts the statement of the case of the Respondent.

INTEREST OF THE AMICUS

Amicus is the Prosecuting Attorneys of Association of Michigan, to which all elected Prosecuting Attorneys in the state are members. Charged with the responsibility of litigating all criminal violations, including drug offenses, in their respective counties, the outcome of the current litigation is a matter of great interest to all prosecuting attorneys, and thereby the Association.

ARGUMENT

MICHIGAN'S MANDATORY PENALTY OF LIFE IN PRISON WITHOUT PAROLE FOR CERTAIN DRUG OFFENSES INVOLVING OVER 650 GRAMS OF A SUBSTANCE CONTAINING THE DRUG IS NOT VIOLATIVE OF THE EIGHTH AMENDMENT.

A. Introduction

In part C of this argument amicus will attempt to demonstrate that under the analysis seemingly compelled by /#Solem v Helm,@ 463 US 277, 77 L Ed 2d 637, 103 S Ct 3001 (1983)#/ Michigan's mandatory life penalty without parole for certain narcotics offenses involving over 650 grams is not violative of the Eighth Amendment because not "excessive." It will be demonstrated that the penalty is not "disproportionate" to the crime when the nature of that crime is examined, including its blight on "life after life...sparing not even the unborn," see /# Terrebonne v Butler,@ 848 F 2d 500 (CA

5, 1988)#/, and an examination is made with regard to other crimes and their penalties within the State, and with regard to the penalties for similar offenses in other jurisdictions. See Solem v Helm, 463 US at 292 summarizing the appropriate factors in an "excessiveness" analysis. In short, it will be shown that the penalty does not run contrary to the "evolving standards of decency that mark the progress of a maturing society." Trop v Dulles, 356 US 86, 101, 2 L Ed 2d 630, 78 S Ct 590 (1958)(plurality opinion). First, however, in logical order, amicus will submit that this analysis is entirely inappropriate for this Court, at least with regard to a term of imprisonment, and that, it being to the contrary, Solem v Helm should be overruled.

B. Solem v Helm Should Be Overruled: A "Mature" Society Expresses Its Views on "Decency" Through Its Legislature

The historical background informing the meaning of the phrase "cruel and unusual punishment" has been explored in depth by various members of the Court, and will not be belabored here. Rather, the beginning of the inquiry will be Rummel v Estelle, 445 US 263, 63 L Ed 2d 382, 100 S Ct 1133 (1980), the first case to consider the question of whether the length of a term of imprisonment alone can be violative of the Eight Amendment as "cruel and unusual." In Rummel the defendant was sentenced to life in prison as an habitual offender upon his conviction of obtaining $120.75 by false pretenses, having been previously convicted of fraudulent use of a credit card to obtain $80 worth of goods or services, a felony, and also passing a forged check in the amount of

$28.36, also a felony. Rummel's life sentence did not preclude parole. The Third Circuit, sitting en banc, affirmed the denial of habeas relief sought on Eighth Amendment grounds, relying largely on the fact that Rummel would be eligible for parole within 12 years of confinement. This Court affirmed.

The Court observed that death penalty cases are different in kind from all other sentences, and that thus death penalty Eighth Amendment jurisprudence is of limited utility in analyzing an Eighth Amendment imprisonment claim. The Court also noted that it was critical that the "Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices." 445 US at 275. Although undertaking what might be called a limited proportionality review, the Court

concluded that "Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 states, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States. As Mr. Justice Holmes noted in his dissenting opinion in Lochner v New York..., our Constitution 'is made for people of fundamentally differing views....'" 445 US at 281-282. In the end, said the Court, while all would, of course, "like to think that we are 'moving down the road toward human decency'....Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies....This uncertainty reinforces our conviction that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its

sustaining force in the legislatures, not in the federal courts."

However, three years later in Solem v Helm the Court reached a different result on similar facts. Helm had been convicted of six felonies in an eleven year period, including three convictions of third-degree burglary. The final conviction which triggered his recidivist prosecution was his seventh felony conviction, and was for uttering a "no account" check for $100. The recidivist penalty again was life in prison, but unlike Rummel the sentence was not subject to parole, and it was this factual difference which tipped the scales for the majority of the Court. First, the Court rejected the argument of the State that "excessiveness" or "proportionality" reviews are inappropriate outside the death penalty

situation, though acknowledging that "outside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare." 463 US at 289-290. The Court concluded that as to any and all sentences, the sentence "must be proportionate to the crime for which the defendant has been convicted," granting to legislatures "substantial deference" to determine the appropriate punishment for a particular crime. However, the Court believed that it (as well as all other courts, including single judge courts) was "competent to judge the gravity of an offense" just as a legislature must "in the first instance." The majority cited as appropriate factors in ascertaining proportionality, and thereby constitutionality, 1)the gravity of the offense and the harshness of the punishment; 2)the sentences imposed on

other criminals in the same jurisdiction; and 3)the sentences imposed for commission of the same crime in other jurisdictions. 463 US at 292. Applying these factors, the majority found that the sentence violated the Eighth Amendment, distinguishing Rummel because of the possibility of parole in that case.

The four dissenting Justices, led by the Chief Justice, read the decision of the majority to mean "that a sentence is unconstitutional if it is more severe than five Justices think appropriate. In short, all sentences of imprisonment are subject to appellate scrutiny to ensure that they are 'proportional' to the crime committed."[1] 463 US at 305. The

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1. The predictions of Chief Justice Burger dissenting in Solem v Helm that a flood of litigation would be unleashed have come true. Federal courts now engage in extensive proportionality analysis of the length

dissenting Justices read the rule of Rummel differently than did the majority; that is, they read the rule to be, in

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(1. con't) of sentences almost routinely, as do state courts. See e.g. United States v Martorano, 866 F 2d 62 (CA 3, 1989)(life sentence without parole for importation of thousands of pounds of drugs); Terrebonne v Butler, 848 F 2d 500 (CA 5, 1988) (extensive proportionality analysis regarding state statute of mandatory life without parole for delivery of 22 packets of heroin); Cocio v Bramlett, 872 F 2d 889 (CA 9, 1989) (extensive proportionality analysis, surveying all 50 states and the District of Columbia, with regard to state statute requiring life sentence without possibility of parole for 25 years for manslaughter under the influence of alcohol by a convicted felon while on parole); United States v Elkins, 885 F 2d 775 (CA 11, 1989) (examining 5 and 10 year sentences for violating export control regulations for selling $57 million worth of high technology aircraft equipment to an unfriendly nation for excessiveness); Young v Miller, 883 F 2d 1276 (CA 6, 1989), examining the Michigan narcotic penalty now at issue before the Court for excessiveness under a proportionality analysis), among a host of others (that few, if any of these challenges are successful does not mean that litigation has not been increased markedly).

cases of imprisonment, that "the length of the sentence imposed is purely a matter of legislative perogative." 463 US at 307. The dissent found the "three factor" proportionality review conducted by the majority squarely rejected by Rummel, and observed that in Hutto v Davis, 454 US 370, 70 L Ed 2d 556, 102 S Ct 703 (1982) the Court had reversed the Fourth Circuit not because of an improper weighing of factors, but because it was improper for a federal court to even engage in a disproportionality analysis, thereby second-guessing the legislative determination as to the appropriate punishment for the crime.

Though not Eighth Amendment imprisonment cases, several other cases from this Court require mention. First is Mistretta v United States, 102 L Ed 2d 714 (1989), the so-called "sentencing guidelines" case, where this

Court said that "the scope of judicial discretion with respect to a sentence is subject to congressional control." It has been recognized, then, that outside the capital sentencing context individualized sentencing is not required, and thus any Eighth Amendment review of a particular sentence of imprisonment (e.g., the mandatory penalty required in the instant case) may take no account of the background of the particular offender (for example, that he is a first offender). See also Lockett v Ohio, 438 US 586, 605, 57 L Ed 2d 973, 98 S Ct 2954 (1978), United States v Howard, 894 F 2d 1092 (CA 9, 1990).

Next is the recent death penalty case of Stanford v Kentucky, 106 L Ed 2d 306 (1990). The question involved in Stanford was "whether the imposition

of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eight Amendment." 106 L Ed 2d at 315. Noting that such an assertion would be historically unsupportable, the plurality opinion upholding the sentences observed that "Neither petitioner asserts that his sentence constitutes one of 'those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'" 106 L Ed 2d at 317. The argument, then, was left to whether capital punishment in the circumstances of the case was contrary to "evolving standards of decency that mark the progress of a maturing society." 106 L Ed 2d at 317-318. But how is such an inquiry to be carried out? What is the measure? What informs the judgment? What tools

does a court have to make it? What enables a court to overrule society's expression of its "standard of decency," communicated through statute, imposing a different standard, which is also supposed to be society's standard and not the court's, especially given that "'those institutions which the Constitution is supposed to limit' include the Court itself"? 106 L Ed 2d at 324.

The Court in Stanford canvassed the law of other jurisdictions (in the United States, it being American society which is the concern of the Constitution) and found no consensus against capital punishment for 16 and 17 year old offenders. The plurality (Justice O'Connor not joining this portion of the opinion) also rejected use of socioscientific, ethicoscientific, or

even purely scientific evidence as an "available weapon" in the argument, for the role of the Court, held the plurality, is not to create an evolving standard of decency (that is, not to be an agent of evolution in one direction or the other), but to discover or identify it--not what it should be, but what it is. The plurality disputed the contention of the dissent that it was simply leaving the meaning of the Eighth Amendment to the political majority. Rather, said the plurality, though the Court had cut loose from history in its Eighth Amendment jurisprudence, that action did not leave the Court rudderless, or at least should not have. "Evolving standards of decency" is not a shorthand reference to the preferences of a majority of the court:

> ...to mean that as the dissent means it, ie., that it is for us to judge, not on the basis of what we perceive the Eighth

> Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment'--to say and mean that, is to replaces judges of the law with a committee of philosopher-kings. 106 L Ed 2d at 324.

Finding, then, neither an historical nor a modern societal consensus forbidding imposition of the death penalty on any person who murders at age 16 or 17, the Court concluded that the punishment did not violate the Eighth Amendment.

With this background, amicus returns to the premise of this section--Solem v Helm should be overruled. As indicated in footnote 1, the decision has led to much federal and state litigation, most of it fruitless on the behalf of the defendant, involving the judiciary in proportionality analyses of virtually any

prison sentence upon a claim by the defendant of a violation of the Eighth Amendment. This sort of scrutiny of legislative decisions of the States (or the Congress) is not appropriate--there should not be a "sufficiency of the evidence" test with regard to the decisions of legislatures on the appropriate punishment for criminal acts. Indeed, if the question is whether the punishment meets the "evolving standards of decency," how better are the standards of decency reflected than by the vote of the democratically elected representatives of the society, unless it is not actually the standards of decency of society with which the Eighth Amendment is concerned, but rather the standards of decency of a particular elite (with no assurance, of course, that those standards are in any sense "better"

than those society has expressed through the franchise).

A great problem with judicial review of the length of sentences as to whether they fall within "standards of decency" under a proportionality review is that the test appears to be a one-way ratchet, despite then Justice Rehnquist's observations in Rummel that while all would, of course, "like to think that we are 'moving down the road toward human decency'....Within the confines of (judicial) proceeding(s)...we have no way of knowing in which direction that road lies...." That the ratchet can only turn one way is compelled by an analysis which requires a comparison with other penalties within the State and with penalties from other States. Certainly a finding that a particular State is lenient, in comparison with others, will

not lead to a finding of a constitutional violation, but if that State stands out as most severe then that fact is at least a heavy factor weighing against the constitutionality of the penalty. But common sense, as well as experience, tell us that the sense of society as to the decency of a particular punishment for a class of criminal conduct sometimes turns the other way, becoming more harsh. Solem v Helm prevents a State from becoming a leader in this regard, because then it will fail a proportionality review when compared with other States, and when compared with the view of the judiciary as to the seriousness of the crime, at least where that view differs from that of the society (as expressed through its elected representatives).

Alcohol related motor vehicle offenses are a case in point. For many

years alcohol related automobile offenses were taken very lightly. Experience demonstrated that this attitude was unjustified, given the roadside carnage caused by drunken drivers. This Court itself noted in Welsh v Wisconsin, 466 US 740, 104 S Ct 2091, 80 L Ed 2d 722 (1984) that the State there had an unusually lenient penalty for drunken driving (preventing, in the Court's view, an exigent circumstances entry to arrest for that offense). Justice Blackmun in particular observed that it was "amazing" to him that a State could still classify drunken driving as a civil violation with only a fine for a first offense. As he put it, "The State, like the indulgent parent, hesitates to discipline the spoiled child very much, even though the child is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's

act." See also Michigan State Police v Sitz, 47 Cr L 2155 (1990) (Justice Blackmun concurring, observing that by 1969 the death toll from drunk driving exceeded that from all our wars). But now in most jurisdictions, "society has set its face against" (see Stanford v Kentucky, 106 L Ed 2d at 323) such lenient treatment of drunken drivers. The societal ratchet has turned the other way with regard to appropriate punishment. See e.g. Cocio v Bramlett, 872 F 2d 889 (CA 9, 1989). But Solem makes no allowances for standards of decency requiring harsher treatment of certain offenders, assuming that a "mature" society is one which treats offenders less severely than it had (apparently when immature) in the past.

The societal ratchet has also turned in a manner similar to that of drunken driving with regard to narcotics, and it may be that Michigan is one of the leaders in this regard (a proportionality review will be conducted infra). Amicus submits that the State has a right to be a leader, and that a State legislature may play a role in the shaping of contemporary standards of decency throughout the Nation. Though Michigan's legislature may have set a harsh penalty, the penalty is certainly not one against which "society has set its face"; indeed, society, in the sense of other jurisdictions, is moving in the same direction (Michigan is truly a leader, and not a deviant, in this regard). The differences among jurisdictions turn principally upon the amount of substance which triggers the most severe penalties--the federal jurisdiction, in

fact, is moving toward a possible death penalty for certain drug offenses (see brief of Respondent).

Where the only issue is the length of punishment, and not the mode (see Weems v United States, 217 US 349, 54 L Ed 793, 30 S Ct 544 (1910), and death penalty cases) this Court ought to abandon proportionality review, as our Constitution "'is made for people of fundamentally differing views....'", no federal standard of appropriateness being required (or even permitted). Here Petitioner cannot assert that his sentence constitutes one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." Stanford, supra. And while in the capital sentencing area this Court has cast loose from history, and perhaps

irretrievably so, there is no need for this Court to continue, on scant precedent, to do so with regard to sentences of imprisonment, particularly given that standards cannot be drawn which do not, in the end, turn on the preferences of a majority of the Court. If the test is "evolving standards of decency," then the Court is ill-equipped, particularly as compared to a legislature, to make the assessment of the seriousness of a crime and the harshness of the punishment, particularly armed with a ratchet which turns only one way. Solem v Helm should be abandoned, and the sentence here affirmed, with no proportionality analysis undertaken, and federal review of state sentences of imprisonment on the grounds of "excessiveness" should cease.

Before leaving this section of argument, amicus must candidly recognize that in Rummel then Justice Rehnquist did state, in footnote 11, that "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent...if a legislature made overtime parking a felony punishable by life imprisonment." 445 US at 274 (Amicus doubts this is actually correct; in such a situation an extended proportionality analysis would be unnecessary--like obscenity in the First Amendment area, the "obscenity" of such a penalty would be "known when seen" without further analysis. However, as amicus will suggest below, this Court should not be deterred from overruling Solem v Helm by impossible hypothetical situations). It might be said, then, that even Rummel rejects the result sought by amicus, the end of

proportionality review of sentences of imprisonment. But of course, neither this case, nor any other, presents such an extreme example, nor, amicus submits, will such extreme examples ever be presented by legislative action. This court should not adopt a rule which contemplates that which cannot occur.

In his work Democracy and Distrust (Harvard University Press: 1980), Professor John Hart Ely pondered the constitutionality of a hypothetical statute prohibiting gall bladder operations except to save the person's life. His answer was that the statute could not pass, and that if it did it would be repealed and the representatives who passed it possibly impeached. To the claim that perhaps that wouldn't happen either, the representatives and the public all "just acting crazy," and there

being no possibility of reasoning with them, Professor Hart responded:

> You know what you're telling me? that you don't believe in democracy. With neuroses like yours, I sure as hell would be worrying about problems a lot less rarified than substantive versus participational review. Like whether I'm going to read in tomorrow's paper that my dog is under consideration for Secretary of Agriculture. Ely, at 182.

Professor Ely concluded that "It is an entirely legitimate response to the gall bladder law to note that it couldn't pass and refuse to play any further." In fact, he continued, "it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for the situations where representative government cannot be trusted, not those where we know it can." Ely, at 183 (emphasis added). This language is precisely appropriate for the

"overtime parking" example--this Court should refuse to play, and should not "deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted." This Court should overrule Solem v Helm, and should not be deterred by the overtime parking example, or any other absurd hypothetical.

C. The Michigan Statute Is A "Mature" Societal Expression Of An Evolving Standard of Decency With Regard to the Scourge of Drug Offenses

Amicus also submits that on a proportionality analysis which compares the penalty and crime in the instant case with that of other crimes within Michigan, and with similar offenses in other States, the penalty here passes review. These comparisons are well-covered in the brief of the Respondent, and will not be reiterated at length here. Suffice it to say that in

Young v Miller, 883 F 2d 1276 (CA 6, 1989) the Sixth Circuit rejected the precise Eighth Amendment claim here at issue. That court noted that "we have little doubt that (defendant's) crime is one of the gravest a person can commit today....The ripple effect on society of such a large quantity of heroin is staggering to contemplate." 883 F 2d at 1283. Amicus would point out that though upholding the statute the court made the mistake of considering personal characteristics of the defendant--that she was a first offender, that she was 25 years old at the time of the crime, that she was the mother of a small child, and that she was not the major target of the investigation. But, as has been stated, it has been recognized that outside the capital sentencing context individualized sentencing is not required, and thus any Eighth Amendment review of a particular

sentence of imprisonment (e.g., the mandatory penalty required in the instant case) may take no account of the background of the particular offender. Lockett v Ohio, 438 US 586, 605, 57 L Ed 2d 973, 98 S Ct 2954 (1978), United States v Howard, 894 F 2d 1092 (CA 9, 1990).

Examining other crimes in Michigan, the court found the sentence the same as that for first degree murder and treason, with discretionary life sentences with the possibility of parole existing for second-degree murder, attempted murder, causing death by explosives, armed robbery, first-degree criminal sexual conduct, and kidnapping, among others. The court did not find the fact that Michigan had chosen to recognize the "devastating consequences" of large-scale drug trafficking by "treating that crime

as being more serious than many of the violent crimes" to be inappropriately disproportionate.

With regard to the law of other States, the court found that only Louisiana had as severe a penalty for first offenders (again, a factor amicus submits should not be considered in the Eighth Amendment calculus). See cataloguing of jurisdictions at 883 F 2d at 1285-1285. However, the court found that the Michigan sentence was "in the range" of drug laws of other States, noting that "it may well be that many of these states will change their penal codes to provide even stiffer sentences for drug offenders in the future." The court thus concluded that the penalty did not violate the Eighth Amendment (it should be observed that in different jurisdictions the problem of a particular

class of offense may be different, justifying a different--i.e. more severe --response in one jurisdiction as compared to even a number of others. Each legislature should have freedom to determine the nature of the problem within its borders, and thus the appropriate penalty.)

One other case is worthy of note in this regard, and that is Terrebonne v Butler, 848 F 2d 500 (CA 5, 1988)(en banc), upholding the Louisiana penalty scheme, and oft-cited in Young v Miller. Though finding the criteria offered in Solem v Helm "of little assistance," the court did its best, and engaged in the same sort of analysis the Young v Miller court did later. Quoting from the original panel decision the court observed that:

> Except in rare cases, the murderer's red hand falls on one

> victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image--others who create others still, across our land and down our generations, sparing not even the unborn. 848 F 2d at 504.

The court also recognized the value judgments involved in "comparing crimes," value judgments that courts are ill-suited to make:

> Nor can we say, attempting as best we can to compare the apple of aggravated kidnapping, the orange of heroin dealing and the pear of aggravated arson with each other, that Terrebonne 'has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.' And the reason we cannot do so is that it is far from clear to us that the other crimes that Louisiana punishes similarly are 'far more serious.' 848 F 2d at 504.
>
> ...we are not equipped, nor do our procedures lend themselves to equipping us, with the factual knowledge and common sense of what is proportional, what punishments should be administered for particular offenses, and along what general lines the positive legislative

> attack on criminality should proceed. One who is to do tnis has need, like Antaeus, to touch the earth pretty frequently, an exercise to which our isolation does not conduce. 848 F 2d at 506-507.

Comparing other jurisdictions also, the court concluded that though severe the sentence was not "bizarre or outlandish," and concluded that the sentence did not violate the Eighth Amendment. Amicus submits that the isolation of this Court also does not allow it to "touch the earthy" with regard to the severity of the crime involved here, and that the Court should not undertake to do so, for it cannot without assuming the function of a legislature.

D. Conclusion

In summary, then, amicus submits the following:

1) Solem v Helm should be overruled. Outside the capital punishment area proportionality review of sentences for "excessiveness" should cease. "Evolving standards of decency of an evolving society" are best expressed through the elected representatives of that society rather than the judicial branch of Government, particularly in those circumstances where life-tenured federal judges are otherwise required to second-guess the decisions of State legislators as to the standards of decency that are evolving with regard to particular offenses, and particularly if it is recognized

that standards may evolve both ways (that is, may become more severe for certain offenses).

2) If the Court undertakes a proportionality review, then under a proportionality review for

"excessiveness" the Michigan statute passes as the expression of a "mature society" of a "decent" standard. This review is undertaken not by looking at the individual characteristics of the offender (outside the capital sentencing area individualized sentencing is not required by the Eighth Amendment; if a review of the individual characteristics of the offender were undertaken, it would provide Petitioner no succor), but at the severity of the offense and the severity of the punishment. Given the massive problem of drugs, and the tremendous harm caused by amounts exceeding 650 grams, the punishment here is in no way "bizaare" or "outlandish." It is, in fact, most appropriate.

CONCLUSION

Wherefore, amicus respectfully requests that the judgment of the Michigan Court of Appeals be affirmed.

Respectfully submitted,

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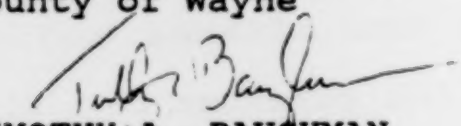

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RONALD ALLEN HARMELIN,

Petitioner,

v

STATE OF MICHIGAN,

Respondent.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF FOR THE STATE OF MICHIGAN AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

WHETHER MICHIGAN'S MANDATORY LIFE SENTENCE WITHOUT PAROLE FOR POSSESSION OF A CONTROLLED SUBSTANCE IN AN AMOUNT OF 650 GRAMS OR MORE IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

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National Treasury Employees Union, et al v Von Raab, 489 US ___; 103 L Ed 2d 685 (1989) 24

People v Coles, 417 Mich 523; 339 NW2d 440 (1983) 7,17

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People v Snow, 386 Mich 592; 194 NW2d 314 (1972) 17

People v Tanksley, 103 Mich App 268 (1981) quoting State v Millery, 364 So2d 1283 (La, 1978) 28

Rummel v Estelle, 445 US 263 (1980) 25,26

Solem v Helm, 463 US 277 (1983) ...7,8,10,11, 14,16,23,25,26

Terrebore v Butler, 848 F2d 500 (CA 5, 1988) (en banc) cert den, ___ US ___; 109 S Ct 1140; 103 L Ed 2d 201 (1989) 25

United States v Grayson, 438 US 41 (1978) 6

United States v Milburn, 836 F2d 419 (CA 8, 1988), cert den, ___ US ___; 108 S Ct 2880; 101 L Ed 2d 915 (1990) 24

United States v Stewart, 820 F2d 1107 (CA 9, 1987), cert den, 484 US 867; 108 S Ct 192; 98 L Ed 2d 144 (1987) 24,25

Pages

Weems v United States, 217 US 349 (1910) 6

Whitley v Albers, 475 US 312 (1986) 4

Wilkerson v Utah, 99 US 130 (1878) 5

Williams v New York, 337 US 241 (1949) 17

Young v Miller, 883 F2d 1276 (CA 6, 1989) 20,29

CONSTITUTION AND STATUTES

U.S. Const, Amend VIII 4,6,23,26

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Administrative Order 1988-4, 430 Mich xxxi (1988) 9

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21 USC §841(B)(1)(A) 24

21 USC §848(e) 24

MISCELLANEOUS

Ann Arbor News, August 26, 1990,
Special Report, A1 14

Chafken and Johnson, Characteristics of Different Types of Drug-Involved Offenders, Issues and Practices in Criminal Justice, p. 17,
February, 1988 22

Drug Abuse Trend Update,
Detroit/Wayne County, Michigan 13

Federal Offenses and Offenders,
DRUG LAW VIOLATORS, 1980-86,
Bureau of Justice Statistics,
Special Report, June, 1988 19

Felony Sentences in State Courts, 1986,
Bureau of Justice Statistics Bulletin,
February, 1989 19

Carolyn S. Korneck, Associated
Press, Washington, D.C., 8-4-90 2

Legislative Analysis HB 4190 (5/17/78) .. 18

Newsweek, March 13, 1989, at 16,21 12,18

Pages

SENTENCING IN MICHIGAN, Report of
the Michigan Felony Sentencing
Project, July 1979, at 8-9 9

Washington Post,
April 4, 1989 at A15 12

INTEREST OF THE STATE OF MICHIGAN

This case presents the question whether a Michigan statute mandating a life sentence without parole for possession of a controlled substance in the amount of 650 grams or more imposes cruel and unusual punishment under the Eighth Amendment. The State of Michigan has a compelling interest in combating drug trafficking in order to reduce drug related crime, drug addiction and related problems. One form the State Legislature has chosen to attack these problems is to enact statutory provisions requiring convicted drug offenders to be sentenced to mandatory prison terms or mandatory minimum terms. The mandatory life sentence without parole for possession of cocaine in an amount involving 650 or more grams is the sentence at issue in this case. Mich. Comp. Laws 333.7403(2)(a)(i).

SUMMARY OF ARGUMENT

Since 1978, drug related crime and related concerns have exploded on the national and local fronts. In 1989 Detroit, Michigan, had a murder rate of 60.0 per 100,000 population, while Washington, D.C., led the nation with a rate of 72.0. Nationally recognized criminologists place much of the blame for this extraordinary level and degree of violence on the illicit drug trade. [Carolyn S. Korneck, Associated Press, Washington, D.C., 8-4-90].

In 1978, the Michigan Legislature amended the Controlled Substances Act of 1971, to mandate prison terms for sale or possession of 50 grams or more of illegal drugs. This amendment specifically exempted first time violations for possession of schedule 1 or 2 drugs (opiates and cocaine) in amounts over

225 grams from an existing option of probation. Recodified as part of the Public Health Code (Part 74. Offenses and Penalties) 1978 PA 368 (imd. eff. May 17, 1978), the mandatory life without parole provisions were as follows:

a. MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) delivery or possession with intent to deliver controlled substance mixtures in amounts of 650 grams or more.

b. MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i) possession only; 650 grams or more

c. MCL 333.7413(a); MSA 14.7413(1) delivery or possession of more than 50 grams on a second controlled substances offense.

Because this case involves a challenge to a legislatively imposed mandatory life sentence without parole, as opposed to one involving judicial discretion, the focus of this brief is on the appropriate standard for

judicial review of the constitutionality of legislatively mandated sentences.

ARGUMENT

THE PROPORTIONALITY TEST FOR REVIEW OF INDIVIDUALIZED SENTENCES IS NOT AN APPROPRIATE STANDARD TO REVIEW THE CONSTITUTIONALITY OF A MANDATORILY IMPOSED SENTENCE WHICH BYPASSES JUDICIAL DISCRETION.

The Eighth Amendment necessarily limits "the power of those entrusted with the criminal law function of government." Whitley v Albers, 475 US 312, 318 (1986), citing Ingraham v Wright, 430 US 651, 664 (1977). Thus, the primary focus of the Eighth Amendment is on the potential for governmental abuse of its prosecutorial powers. Browning-Ferris Industries, Inc v Kelco Disposal, Inc, 492 US ___, 106 L Ed 2d 219, 233 (1989).

The legal principle underlying the Eighth Amendment's prohibition against cruel and

unusual punishment is historically rooted in English common law jurisprudence and is well documented. As described in Ingraham v Wright, supra, 430 US at 664:

> "The English version ... was intended to curb the excesses of English judges under the reign of James II ... as a reaction to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 ... or to the perjury prosecution of Titus Oates in the same year." [footnote omitted].

The legal framework to guide Eighth Amendment analysis of the cruel and unusual punishment clause is more diffuse. In part, this is due to the difficulty in defining the term "cruel and unusual," Wilkerson v Utah, 99 US 130 (1878), and in part due to the historical rise of indeterminate sentencing policies based on changing penological theory approximately a century ago. At that time, the philosophy of penology changed from

legislatively specified, fixed, periods of incarceration to one employing judicial discretion in formulating sentences. United States v Grayson, 438 US 41, 45-46 (1978). The underlying premise for this direction was that the sentence should fit the offender because of the desirable social goal of rehabilitation. Id., 46. See Cummins v People, 42 Mich 142, 144; 3 NW 305 (1879); Cf. Weems v United States, 217 US 349 (1910) (the scope of the Eighth Amendment's prohibition against cruel and unusual punishment is not static, but acquires meaning as public opinion becomes enlightened by a humane justice).

The resulting historical shift from fixed sentences to indeterminate sentencing schemes "delegated almost unfettered discretion to the sentencing judge to determine what the

sentence would be within the customarily wide range so selected ...". Mistretta v United States, 488 US ___; 102 L Ed 2d 714, at 726 (1989); Cf. People v Coles, 417 Mich 523, 533 (1983) ("A sentence reflecting undue emphasis on revenge or one imposed pursuant to a local sentencing policy which removes the trial court's discretion to individualize sentences is infirm." [footnote omitted]).

Review of discretionary, indeterminate sentences necessitated criteria to determine when a judicially imposed sentence was cruel and unusual punishment. As epitomized in Solem v Helm, 463 US 277 (1983), these criteria are: 1) the gravity of the offense and harshness of the penalty; 2) comparing the sentence received with sentences received by other criminals in the same jurisdiction; and 3) comparison with sentences received for

commission of the same crime in other jurisdictions. There is no doubt that the Helm criteria are rooted in the principle of individualized sentencing, as stated by the Court:

> "The inherent nature of our federal system and the need for individualized sentencing decision result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment ..." 463 US at 290, n 17.
> [Emphasis added]

Due to substantial evidence showing that individualized sentencing frequently resulted in unjustified disparity in sentences, winds of change have swept across penological theories during the last two decades. Additionally, the underlying rationale for social rehabilitation of criminal offenders within a prison setting was subject to serious question. Prisons themselves have

become "more concerned with security, status maintenance, and population control." SENTENCING IN MICHIGAN, Report of the Michigan Felony Sentencing Project, July 1979, at 8-9.[1] One result has been a shift toward determinate sentences which provide certainty, eliminate disparities and fulfill broader societal objectives such as deterrence or incapacitation.[2]

The legal framework which developed in the almost universal context of Eighth

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[1]Pertinent portions of this Report have been lodged with the Clerk of the Court.

[2]By Administrative Order 1984-1, 418 Mich lxxx (1984); Administrative Order 1985-2, 420 Mich xii (1985); Administrative Order 1988-4, 430 Mich xxxi (1988), sentencing judges in Michigan are required to use the Michigan Felony Sentencing Guidelines for listed offenses. The recommended minimum sentence range is not, however, mandatory. MCL 333.7403(2)(a)(i) is exempt from these Guidelines.

Amendment analysis of individual sentences does not readily lend itself to a determination of the constitutional validity of these newer mandatory legislative schemes. By its nature, the Helm standard infringes deeply upon the doctrine of federalism. First, the subjective ranking of crimes as to their severity fails to take into account each states' independent authority to assign law enforcement priorities. Writing for the dissent in Helm, Chief Justice Burger recognized this infringement stating that, "[L]egislatures are far better equipped than we are to balance the competing penal and public interests and to draw the eventually arbitrary lines between appropriate sentences for different crimes." 463 US at 314. Second, the use of Helm criteria infringes federalism by comparison between states as to treatment of similar offenders. This effects

a least common denominator approach since some individual states will always have the distinction of being in the forefront, or in a backwater, of law enforcement efforts. See Hutto v Davis, 454 US 370, 373, n 2 (1982). Third, the proportionality theory which " ... requires a nexus between the punishment imposed and the defendant's blameworthiness," Enmund v Florida, 458 US 782, 825 (1982) (J. O'Connor, dissenting), has integrity only when the sentence is tailored to the individual offender. Thus, the proportionality review of mandatory sentences, involves a direct intrusion on the states' authority to define their criminal offenses since it assumes that federal courts are better able to make such a judgment.

Under these circumstances, amicus questions the efficacy of the Helm criteria

as a means of evaluating the constitutionality of the mandatory punishment at issue in this case.

A. MANDATORY PENALTIES NECESSARILY REJECT THE CONCEPT OF INDIVIDUALIZED SENTENCING WHICH FORMS THE HISTORIC PREMISE UNDERLYING PROPORTIONALITY REVIEW.

By any measure, drug trafficking and drug use are a critical threat to the health and welfare not only to Michigan's citizens, but to the nation's citizens.[3] According to recent statistics compiled by the National Institute on Drugs and Abuse (NIDA) and the Michigan Department of Public Health, 60% of the 305 homicides which occurred through

[3]Washington, D.C. has the dubious distinction of being referred to as the nation's murder capital. It has been described as a city under seige from within by drug traffickers and their hit men. Newsweek, March 13, 1989, at 16; Washington Post, April 4, 1989 at A15.

May 31, 1990, in Detroit, Michigan were drug related and 32, or 10%, involved youths 17 years old or younger. Drug Abuse Trend Update, Detroit/Wayne County, Michigan (unpaginated report).[4] Cocaine was the primary drug of choice and was related to 28% of hospital emergency room admissions. Id. Very serious health related problems are directly implicated. The number of syphilis cases increased by 48% as a result of trading sex for drugs, usually cocaine. Of reported AIDS cases wherein intravenous drug use was the sole risk factor, 18% were male and 62% female. Id. The impact on children under school age is particularly grave. Forty percent of newborns at one Detroit hospital were prenatally exposed to cocaine or heroin. Ann

[4]The complete document has been lodged with the Clerk of the Court.

Arbor News, August 26, 1990, Special Report, A1. At the national level, a 1988 study showed 11% or 375,000 newborns exposed prenatally to illicit drugs. Id., A15. The costs in terms of pain, suffering, and abandonment imposed on these "crack babies" is incalculable. The dollar costs in terms of medical care and education will be formidable.

The instant case involves the ultimate, non-capital, penalty of life imprisonment without parole. Unlike the sentence in Helm, supra, where judicial discretion was at issue, this sentence was mandated by statute. Thus, the present case squarely presents a challenge to legislative authority to impose a specific penalty for a serious drug offense. A mandatory, legislative sentence reflects a judgment that deterrence and pro-

tection of society requires a penalty which precludes an individualized sentence or the possibility of parole.

As preliminary considerations, outside of the death penalty context, this Court has never held that the Constitution requires individualized sentences. Lockett v Ohio, 438 US 586 (1978). Neither has this Court found an independent constitutional right to release from prison before the expiration of a minimum sentence. Greenholtz v Inmates of Nebraska Penal and Correctional Complex, 442 US 1 (1979); and see 18 USC §3351, et seq, wherein Congress recently abolished parole in its Sentence Reform Act, supra, 18 USC §§ 3551 et seq, 1984. In short, aside from the unique death penalty sanction,[5] the

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[5]Coker v Georgia, 433 US 584 (1987).

Constitution does not preclude mandatory, determinative sentences which omit judicial discretion.

The permissibility of the challenged Michigan scheme at issue here should not depend on application of the Helm criteria unless the Court determines that a criminal defendant subject to such penalty has a constitutional right to an individualized sentence promoting rehabilitation as its goal. This is so, because the only plausible existence for these criteria is that they are effective only where the sentencing judge exercises discretion regarding certain considerations. As determined by this Court during the heyday of indeterminate sentencing, the considerations for judges fashioning a sentence when a state adopts an individualized sentencing scheme included:

1) reformation of the offender; 2) protection of society; 3) disciplining the wrongdoers; and 4) deterrence of others from committing like offenses. Williams v New York, 337 US 241, 247 (1949). Michigan followed suit. People v Snow, 386 Mich 592; 194 NW2d 314 (1972), People v Coles, 417 Mich 523, 580; 339 NW2d 440 (1983).

Michigan's long and continued commitment to an indeterminate sentencing policy, however, did not deter the Michigan Legislature in 1978 from targeting major drug traffickers for mandatory punishments. In sum, the entire amendment mandated imprisonment for the sale of even small quantities of illegal drugs as well as removing an option of life time probation for sale of large quantities. The primary basis for this amendment was recognition of the serious harm

wreaked on society by the illicit drug trade and drug addiction. Legislative Analysis HB 4190 (5/17/78). The pervasiveness of illicit drug trafficking in Michigan, even in 1978, warranted a rejection of imprisonment as a means of promoting rehabilitation of convicted drug dealers since police repeatedly arrested the same dealers because they were so quickly returned to the streets by the justice system. Id. The resilience and growth of drug trafficking and drug use and its resistance to traditional law enforcement methods is now legendary. The resulting national debate appears to form two camps: one which views the problem as a drug war and advocates drastic measures such as martial law, the other which views the problem as a public health issue and advocates decriminalizing drug use. Newsweek, National Affairs, March 13, 1989,

at 21. While the debate continues, nationwide figures show that about 76,000 persons were convicted of drug trafficking in 1986 and served an average of 1 year 10 months imprisonment. Felony Sentences in State Courts, 1986, Bureau of Justice Statistics Bulletin, February, 1989. Federal drug offenders totaled 12,285 in the same year, a 134% increase from 1980, while the average sentence served was 3 years 3 months in prison. Federal Offenses and Offenders, DRUG LAW VIOLATORS, 1980-86, Bureau of Justice Statistics, Special Report, June, 1988.

Notwithstanding the seriousness of the drug problem, Michigan's mandatory drug sentences have been criticized as thwarting rehabilitative goals because they trap first offenders as well as the major drug traffickers. In keeping with that viewpoint,

the Sixth Circuit Court of Appeals in Young v Miller, 883 F2d 1276, 1285 (CA 6, 1989), while upholding the constitutionality of MCL 333.7401(2)(a)(i) (possession with intent to deliver 650 grams or more of heroin) under the Helm analysis, suggested that the "tiger trap may have sprung upon a sick kitten".

Such criticism is, at best, merely commentary on legislative debates concerning what criminal conduct should merit a mandatory penalty without regard to the individual characteristics of the offender. At worst, such criticism is based on certain assumptions which may or may not be true about major drug traffickers.[6] It simply does not follow that a first-time drug offender is also a first-time drug

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[6]Pertinent legislative analyses have been lodged with the Clerk of the Court.

trafficker. For example, as here, the person was carrying a telephone beeper and had a licensed gun strapped to his leg, as well as having over a pound of cocaine and a large amount of cash in his car trunk. Whether or not these facts support a conclusion that the person is a major drug dealer is a matter for debate.[7]

One recent study shows that seemingly respectable adults who are top-level dealers usually buy drugs by the kilo and sell by the pound. It also suggests that such drug traffickers have few business contacts and sell

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[7]In People v McCarthy, 113 Mich App 464, 470, n 5; 317 NW2d 659 (1982), the Michigan Court of Appeals dispelled any notion that 650 grams of a controlled substance was a trifling quantity, finding that the street value of 650 grams or more of cocaine or heroin had a street value of close to $1 million which resulted in large profits to the drug wholesaler.

only to a few persons well known to them. As a means of insulating themselves from arrest, they hire middlemen or "lieutenants" who keep control over the low-level dealers and customers. As a result, these individuals were less likely to have arrest records than were users who frequently committed crimes to support habits. See Chafken and Johnson, Characteristics of Different Types of Drug-Involved Offenders, Issues and Practices in Criminal Justice, p 17, February, 1988.

The above illustrates the dangers of judicial speculation as to the "appropriateness" of mandatory penalties in the context of individual cases. Sparse records and unsound assumptions can easily produce skewed results. It is submitted, then, that constitutional review of mandatory penalties requires an approach markedly

different from application of the subjective factor analysis of Helm.

Amicus thus offers the following formulation as an alternative which appropriately balances Eighth Amendment concerns and the state's interest in effective law enforcement.

B. A RATIONAL BASIS TEST IS NEEDED TO JUDGE WHETHER MANDATORY PENALTIES VIOLATE THE EIGHTH AMENDMENT.

The insidious spread and growth of drug trafficking and drug use is widespread. As noted recently by this Court in a Fourth Amendment drug testing context, "[T]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to 'the veritable national crisis in law enforcement

caused by smuggling of illicit narcotics'." National Treasury Employees Union, et al v Von Raab, 489 US ___; 103 L Ed 2d 685, 704 (1989).

One obvious legislative response to the drug war has been increased reliance on mandatory penalties to increase the certainty of punishment for drug offenders. This trend has included the use of life imprisonment without parole.

Federal law now provides for a mandatory life sentence without parole for a third time drug offender. 21 USC §841(B)(1)(A), and life without parole for drug kingpins, 21 USC §848(e). Upheld, United States v Milburn, 836 F2d 419 (CA 8, 1988), cert den, ___ US ___; 108 S Ct 2880; 101 L Ed 2d 915 (1990); United States v Stewart, 820 F2d 1107 (CA 9, 1987), cert den, 484 US 867, 108 S Ct 192; 98

L Ed 2d 144 (1987) (no prior record). Louisiana imposes a mandatory life without parole sentence for heroin distribution. La Rev. Stat. Ann. Sec. 40.966 (West, 1986). Upheld Compton v Butler, 883 F2d 27 (CA 5, 1987); Terrebore v Butler, 848 F2d 500 (CA 5, 1988) (en banc) cert den, ___ US ___; 109 S Ct 1140; 103 L Ed 2d 201 (1989) rejecting a disproportionality argument.

Amicus contends that this case lends itself perfectly to a decision limiting the Helm proportionality theory to penalties involving a given criminal defendant's individualized sentence and to a mode of analysis which respects the state's autonomy. In principle, this Court has observed this distinction, noting in Rummel v Estelle, 445 US 263, 282 (1980), "that proportionality review was inimical to traditional notions of

federalism," and that the severity of a sentence was "largely within the discretion of the punishing jurisdiction." 445 US at 285. Cf. Solem v Helm, supra, 463 US 277, 290, n 17 (noting Rummel offered no guidance as to how courts were to determine an extreme sentence under the Eighth Amendment).

Amicus, therefore, suggests a different test to judge whether legislatively mandated penalties violate the Eighth Amendment. Under such a test, the reviewing court would determine whether the offense and punishment, as defined by the duly elected state legislature, lacked any rational basis. Stated otherwise, in order for a reviewing court to find that the legislative mandatory sentence was excessive in relation to its purpose, it would have to conclude that no rational state legislature considering the

nature of the offense and penological objectives would impose such a penalty.[8]

Adoption of a rational basis test appropriately accords a presumption of constitutionality to the judgments of individual state legislatures in this regard. Importantly, in the context of mandatory sentences the rational basis test will refocus the Eighth Amendment inquiry to the crime committed rather than on the individual committing it. It will emphasize society's interest in preventing and deterring criminal conduct the consequences of which extend far

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[8]Because the prosecution need only prove the amount of the substance to obtain a conviction, it is likely that additional facts which could further establish drug dealer status might be absent from the record. The fact that the legislature may have made it easier for the prosecution to obtain convictions in this area is not constitutionally impermissible. See McMillan v Pennsylvania, 477 US 79, 89, n 5 (1986).

beyond the immediate circumstances of the offense and any mitigating circumstances. To determine otherwise leads to the anomolous situation of judging mandatory sentences by criteria meant to ascertain individual culpability and to the least culpable offenders setting the ceiling on permissible penalties.

A mandatory life sentence without parole such as the one at issue in this case cannot be an excessive sentence under the Eighth Amendment. The illicit drug trade in Michigan is reprehensible and intolerable. "[C]ompared to the effect of drug traffic on society, isolated violent crimes may well be considered the lesser of two evils." People v Tanksley, 103 Mich App 268, 271 (1981) quoting State v Mallery, 364 So2d 1283, 1285 (La, 1978). The mandatory life penalty in

Michigan's scheme refers to the hard core addictive drugs, principally heroin and cocaine. The scheme recognizes the gravity of drug trafficking and the need to protect society from the major traffickers. Young v Miller, supra, 883 F2d at 1284 (1989). Given the appalling societal cost of the illicit drug trade, a rational legislature could readily conclude that a mandatory penalty of life without parole for drug trafficking effectuates appropriate penological and societal objectives. Their choice comports with the Eighth Amendment.

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Spencer v. Texas, 385 U.S. 554 (1967) 26
United States v. Costelon, 694 F. Supp. 786 (D. Colo. 1988) 25
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United States v. Vizcaino, 870 F.2d 52 (2d Cir. 1989) 24
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State Statutes:

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Tex. Health Code § 481.112 19

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American Council of Life Insurance, *1988 Life Insurance Factbook* 17

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Beyer, *Boarder Babies in District of Columbia Hospitals: Report of the Mayor's Advisory Board on Maternal and Child Health*, (Sept. 6, 1989) 12
Chasnoff, *et. al.*, *Cocaine Use in Pregnancy, Perinatal Morbidity and Mortality*, Neurotoxicology and Teratology, Vol. 9, (1987) 13
The Detroit Free Press, March 23, 1990 9
The Detroit Free Press, March 24, 1990 16
Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-enforcement*, 24 Wake Forest L. Rev. 881 (1989) 13
MacGregor, *et. al.*, *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, Obstetrics & Gynecology, Vol. 74, No. X, 1989 . . . . . 12, 13
Office of National Drug Control Policy, *Leading Drug Indicators White Paper* (Sept. 1990) . *passim*
U.S. Department of Justice, 1988 *Sourcebook of Criminal Justice Statistics* 13
The Washington Post, March 2, 1988 14
The Washington Times, Sept. 4, 1990 . . . . . 11, 14
The Washington Times, Sept. 21, 1990 11
Welch, *Can This Be Life? The Implications of Life Without Parole*, Corrections Compendium (Feb. 1987) 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

RONALD HARMELIN,
Petitioner,

v.

THE STATE OF MICHIGAN,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Michigan

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION, CITIZENS FOR LAW AND ORDER, FAMILIES AND FRIENDS OF MISSING PERSONS AND VIOLENT CRIME VICTIMS, THE MARYLAND COALITION AGAINST CRIME, THE PARENTS ASSOCIATION TO NEUTRALIZE DRUG AND ALCOHOL ABUSE AND THE STEPHANIE ROPER COMMITTEE, INC. IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 120,000 members and supporters nationwide. WLF engages in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in the areas of criminal justice, drug abuse and crime victims' rights. In that regard, WLF has participated as a party

or *amicus* in numerous cases before this Court, as well as in other state and federal courts. *See, e.g., Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990), *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), and *Enmund v. Florida*, 458 U.S. 782 (1982). In addition, WLF filed a sentencing memorandum with the United States District Court in the espionage case *United States v. Whitworth*, No. 85-552 (N.D. Cal 1985), urging that court to impose a lengthy term of years upon the defendant such that he would serve a *de facto* sentence of life without parole. The term of 360 years with no parole for 60 years was upheld on appeal as not violative of the Eighth Amendment. *United States v. Whitworth*, 856 F.2d 1268, 1289 (9th Cir. 1988).

Citizens for Law and Order (CLO) is a grass-roots organization in the state of California devoted to supporting law enforcement agencies in that state in their efforts against crime. CLO supports measures in the California legislature designed to strengthen the criminal justice system. CLO was founded in 1970 and is based in Oakland.

Families and Friends of Missing Persons and Violent Crime Victims is a national organization based in Seattle, Washington, that provides assistance to the families of kidnapped children and victims of other crimes. It is particularly involved with efforts to protect our nation's youth from becoming involved in crime, and supports efforts by law enforement to safeguard neighborhoods from drug dealers.

The Maryland Coalition Against Crime (MCAC) is based in Baltimore, Maryland, and works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims. MCAC is currently supporting the adoption of a "Victims' Rights Amendment" to the Maryland Constitution.

The Parents Association to Neutralize Drug and Alcohol Abuse (PANDAA) is a national organization devoted to eliminating drug use among young people. PANDAA works toward this end by sponsoring anti-drug classes and seminars, by distributing informational materials and by helping families with drug abuse problems in finding effective treatment.

The Stephanie Roper Committee, Inc. is a nonprofit organization based in Upper Marlboro, Maryland. It was founded in 1982 by Roberta Roper, the mother of Stephanie, who was kidnapped, raped, tortured and brutally murdered. The Committee is a victims' rights advocacy organization which has supported and proposed legislation responsive to the needs of crime victims. The Committee has previously appeared in this Court as *amicus curiae* in *Pennsylvania v. Davenport*, 110 S. Ct. 2126 (1990).

Amici are all deeply concerned about the vast human destruction caused by illegal drugs, and support stern measures designed to punish drug traffickers. *Amici* feel that criminals of petitioner's ilk represent one of the most serious threats to American society, and that Michigan's mandatory punishment of life without parole for large-scale drug dealing represents the measured and proper judgment of the people of that state. This brief is being filed with the consent of both parties.

STATEMENT OF THE CASE

On October 12, 1986 Ronald Harmelin was arrested in Oak Park, Michigan for possession of illegal drugs, following a traffic stop. At the time of his arrest, he was a one-man drug market. From his person, police consficated marijuana cigarettes, four brass cocaine straws, one cocaine spoon, three vials containing a white powder of suspected cocaine, twelve Percodan

tablets, twenty-five tablets of Phendimetrazine Tartrate, a Morotola beeper, a .38 caliber revolver, and nearly $600 in cash. During an inventory search of his car, police later found a bag containing 672.5 grams (about one and a half pounds) of nearly pure cocaine, $2,900 in cash, a coded address book, and a number of personal toiletries. Michigan Department of Corrections, Presentence Investigation Report on Ronald Harmelin, April 27, 1987.

Petitioner was convicted of possession of over 650 grams of narcotics and possessing a weapon in the commission of that crime. On April 30, 1987, he was sentenced to the mandatory punishment of life imprisonment without parole as required by Michigan's relatively new anti-drug law making the possession, distribution, or manufacture of such large amounts subject to such penalty. MCL § 333.7403(2).

Petitioner's conviction and sentence were affirmed by the Michigan Court of Appeals on April 18, 1989, and leave to file an appeal with the Michigan Supreme Court was denied on January 29, 1990. This Court granted a petition for writ of certiorari on May 29, 1990, limited to the question of whether the sentence violates the Eighth Amendment's proscription against cruel and unusual punishment.

SUMMARY OF THE ARGUMENT

The fundamental issue in this case is whether or not state legislatures have the power to prescribe severe penalties for serious violations of the law. Petitioner is a convicted drug trafficker who shares a personal responsibility for the thousands of deaths in this nation that are directly linked with illegal drugs. By urging reversal of the sentence in his case, petitioner would have this Court adopt a new, extra-constitutional rule that only judges -- and not legislatures -- may determine appropriate sentences upon persons convicted of extremely serious crimes.

In our view, no proportionality analysis under *Solem v. Helm*, 463 U.S. 277 (1983) is required at all, extended or otherwise, for patently serious offenses involving violence, drugs, and similar crimes, regardless of the characteristics of the offender (*e.g.*, first offender), and regardless of what other punishments may or could have been meted out in the jurisdiction in question or in other jurisdictions for similar crimes. Rather, such analysis is constitutionally required, if at all, only where the crime committed is a minor, non-violent or regulatory crime on the order of that committed in *Solem*. Otherwise, lower courts would be faced with continous challenges to sentences, both determinate and discretionary, imposed for all serious crimes by resourceful counsel who, like counsel in the instant case, present statistical comparisons and novel hypotheticals to show some disparity in sentencing practices. The result of such judicial exercise would be the risk that sentencing decisions will be reduced to determining the lowest common denominator rather than allowing the states the flexibility to deal severely with serious criminal behavior.

In any event, petitioner received a sentence that was directly tied to the extreme severity of his crime. Applying this Court's analytical framework set forth in *Solem*, his sentence was not so grossly disproporationate to his crime as to constitute cruel and unusual punishment under the provisions of the Eighth Amendment.

ARGUMENT

At the outset, it should be made clear what the precise question is before the Court in this case. The question presented in the petition and on which review

was granted is "Whether The Mandatory Sentence of Life Imprisonment Without Possibility of Parole Constitutes Cruel and Unusual Punishment." The question, as conveniently rephrased by petitioner in his opening brief, was whether such a sentence is constitutional under the Eighth Amendment when the sentencing authority is not permitted to consider alleged mitigating factors, namely, that the petitioner had "no prior record and . . .was not a drug kingpin." Rephrased, the question suggests that a defendant has a constitutional right to individualized sentencing, a proposition that has been overwhelmingly rejected by this and lower federal Courts, and one that calls into question federal and state determinate sentencing schemes. *See* Question Presented, Pet. Brief at i. Yet, petitioner later concludes his brief by requesting that "this Court should hold that the Michigan sentencing *statute* in this case is unconstitutional," suggesting that the law be struck down on its face. Pet. Brief at 47. (emphasis added).

It is *amici*'s position that the only proper question before this Court is the constitutionality of the sentence as applied in this particular case, rather than the validity of Michigan's law on its face. Indeed, a facial challenge to the constitutionality of any statute is almost impossible to mount, except in the context of the First Amendment, for the challenger would have to argue that no application of the law would be constitutional. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2980-81 (1990); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). And while the question presented as revised in the brief is couched in due process terms, no Fourteenth Amendment due process challenge was made in this case. Consequently, the question under review should be properly limited to whether or not the imposition of a life sentence without parole in this particular case is a punishment so grossly disproportionate to the major drug offense for which the

petitioner was found guilty so as to constitute cruel and unusual punishment under the Eighth Amendment. The answer is clearly not.

I. PETITIONER'S SENTENCE IS NOT SO DISPROPORTIONATE TO HIS CRIME AS TO BE CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT.

In *Solem v. Helm*, this Court reviewed the constitutionality of a life sentence without parole imposed on a person who was convicted for merely uttering a "no account" check for $100. Since the defendant in that case had six prior felony convictions, his severe sentence was authorized by a recidivist statute of South Dakota. Although this Court had previously sustained a life sentence with the possibility of parole for a similar minor non-violent crime committed by a recidivist in *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133 (1980), the *Solem* Court nevertheless struck down the life sentence without the possibility for parole, concluding that Helm's sentence was "*significantly* disproportionate to his crime, and . . . therefore prohibited by the Eighth Amendment." 463 U.S. at 303 (emphasis added).

In so doing, the *Solem* Court stated that it was guided by the following objective factors: 1) the gravity of the offense and the harshness of the penalty, 2) a comparison of the sentences imposed on other criminals in the same jurisdiction, and 3) a comparison of the sentences imposed for the same crime in other jurisidictions. *Id.* at 291. *Amici* will focus their *Solem* analysis on the first criterion, especially the gravity of the offense prong, which in our view so far outweighs the other factors as to make this Court's resolution of this case a relatively easy matter. For as this Court itself recognized in *Solem*, "[i]n view of the substantial defer-

ence that must be accorded legislatures . . ., a reviewing court rarely will be required to engage in extended analysis to determine that a sentence in not constitutionally disproportionate." *Id.* at 290, n.16. The gravity of the offense in this case is clearly not in the same league as the minor non-violent crimes in *Solem* and *Rummel* which prompted this Court's consideration of the other criteria to determine proportionality under the Eighth Amendment. For while it is true that the difference between the sentence in *Rummel* and *Solem* was the possibility of parole in the former case and not in the latter, that fact is of little, if any, relevance to this case since the underlying crimes in both of those cases were very minor offenses, in stark contrast to the serious crime committed in the instant case.

Other than death penalty cases, which *amici* submit are inappicable to non-capital sentencing (see argument at II, *infra*), petitioner primarily relies upon this Court's decision in *Solem* in claiming that his punishment is cruel and unusual in violation of the Eighth Amendment. While many have questioned the wisdom of *Solem* and some have urged this Court to overrule it,[1] *amici* submit that petitioner's argument may be disposed of even within the framework of that decision, given the extreme severity of petitioner's crime.

A. Petitioner's Punishment Is Not Cruel and Unusual in Light of the Fact That His Crime Is One of the Most Serious Offenses Plaguing American Society.

In his analysis of his offense under *Solem*, petitioner makes an extended effort to minimize the severity of the offense with which he was charged.

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[1] *See, e.g.*, Brief of *amicus curiae* the Prosecuting Attorneys' Association of Michigan.

Pet. Brief at 16-20. Petitioner claims that "[n]ot to take into account the facts of this particular offense or the history and characteristics of the petitioner is a great miscarriage of justice." Pet. Brief at 16.[2] Petitioner has the effrontery to further claim that his crime was simply a singular "mistake in judgment." Pet. Brief at 33.[3] It would be a far greater miscarriage of justice if this Court were to decide this case without recognizing that petitioner has personal responsibility for a part of the enormous human suffering caused by illegal drugs.

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[2] *Amici* suggest that this Court's consideration of this case should not extend to the dispension of mercy upon petitioner. Pleas for mercy are best addressed in a clemency petition to the Governor of Michigan. This Court should confine itself to resolving whether or not petitioner's punishment violates the Constitution.

[3] It is hard to believe petitioner's claim that his crime was a "mistake in judgment." When arrested, he possessed all the tools of a veteran drug dealer: a pistol, a coded address book, a beeper, different types of drugs individually packaged for resale, drug paraphernalia and a large amount of cash. This was not a singular event. Petitioner was convicted of a crime in this incident only, but he is indisputably guilty of many more drug crimes during which he went undetected by police. As one judge aptly put it,

> Go out and try to buy a pound [of cocaine]. They'd look at you and laugh in your face. You've got to work at it. It's the idiot who thinks this is a singular event when someone is caught with this amount.
>
> Sure, they may not have criminal records, but these are people who smell out a chance to make a buck selling poisons that murder our babies.

The Honorable Michael Talbot, Detroit Recorder's Court Judge, *The Detroit Free Press*, March 23, 1990.

Ronald Harmelin was a large-scale drug trafficker who delivered narcotics down to mid-level dealers.[4] He has had no lawful source of income for many years. He does not file income tax returns. The $15,000 bill for his trial attorney was paid in cash by an "associate." The pound and a half of *undiluted* cocaine in his possession at the time of arrest was far more than a normal individual could consume, and had a street value of between $60,000 and $100,000. His self-serving claim is that he was a "mule of transport," and not a drug dealer.[5] Even if this Court takes his claim at face value, petitioner was at the very least a courier of death. Viewing this case in the light most favorable to the government,[6] this Court can easily conclude that Petitioner is not some poor illegal immigrant used as an unwitting "mule," but was rather a savvy shark swimming in the ocean of illegal drugs.[7] He may not

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[4] *Amici's* description of petitioner and the circumstances surrounding his arrest are drawn from the Presentence Report prepared for the trial judge by the Michigan Department of Corrections.

[5] In his brief, petitioner has admitted that his crime was more than simply one of possession of narcotics. By claiming that his role was one of a courier, Pet. Brief at 4, 17, he necessarily concedes that he possessed cocaine *with intent to distribute* to others. Petitioner's self-professed intention to participate in the trafficking of cocaine makes his crime even more serious. Thus, while he was not charged with distribution under Michigan law, it is clear that his actual crime would nevertheless deserve such a punishment. *See Young v. Miller*, 883 F.2d 1276 (6th Cir. 1989).

[6] *Jackson v. Virginia*, 443 U.S. 307 (1979).

[7] Because 650 grams of cocaine is a far greater amount than any drug addict may possess for personal consumption, the punishment petitioner received for mere possession of this amount should be viewed as inferring intent to distribute as an intrinsic part of the
(continued...)

have been a "drug kingpin," as he declaims in his brief, but he surely was a "drug linchpin," without whom drug kingpins would be unable to distribute their poison.

The scourge of illegal narcotics has turned America's major cities into a free-fire zone. Drug dealers' wars, fought with AK-47s, Uzis, 9mm Berettas, and the .38 caliber revolvers like the one that petitioner carried, cause thousands of homicides each year. In the District of Columbia alone, 1989 saw 438 murders, some sixty percent of which were directly related to drug trafficking.[8] Beyond the human costs, the monetary cost of this war has been high. Since 1987 the federal drug law enforcement and abuse budget has grown by fifty-six percent to $5,542,800,000.[9]

Fifty-seven percent of those arrested in the United States for homicide are users of illegal drugs.[10] Drug abusers also include three-quarters of those arrested for burglary, seventy-three percent of the persons arrested for robbery, seventy-one percent of individuals arrested for larceny, and seven out of every ten of those arrested

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[7](...continued)
crime. *See Barnes v. United States*, 777 F.2d 430 (8th Cir. 1985) (in absence of other evidence, 266 grams of cocaine is an amount large enough for jury to infer possessor's intent to distribute); *United States v. Valentin*, 569 F.2d 1069 (9th Cir. 1978) (mere possession of 208 grams of cocaine sufficient to infer intent to distribute).

[8] "Violence Wracks 2 More Suburbs," *The Washington Times*, Sept. 21, 1990 at A1.

[9] *The Washington Times*, Sept. 4, 1990, at A8. The federal budget for drug enforcement and abuse programs is dwarfed by the drug war budgets of the states upon whom falls the main task of enforcing drug laws.

[10] Office of National Drug Control Policy, *Leading Drug Indicators White Paper* 19 (Sept. 1990).

for possession of stolen property.[11] In Philadelphia and San Diego, eighty percent of the men arrested in the first three months of 1990 tested positive for illegal drugs, as did seventy-nine percent in New York City and seventy-eight percent in Chicago.[12] To claim, as petitioner does, that his crime is "non-violent," and therefore should be deserving of more lenient treatment, is to blink reality.

After advancing the discredited claim that experts have "contended that cocaine [is] not addictive," petitioner goes on to baldly assert that death is not "the natural and inevitable consequence of cocaine." Pet. Brief at 19. If petitioner would take the trouble to visit *any* hospital in *any* major city in America he could view first hand the lethal effects of his handiwork. The human destruction caused by illegal narcotics spares not even infants. At the District of Columbia General Hospital -- only a few blocks from the location of this Court -- 22% of the 2,000 babies born at the hospital in 1989 suffered serious medical complications brought about by their mothers' regular use of cocaine during their pregnancies.[13]

These "crack babies" suffer from a number of birth defects, including deformations such as missing extremities (usually fingers), deformed sex organs and prune belly syndrome.[14] A very high number of

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[11] *Id.*

[12] *Id.* at 18.

[13] *See generally* Beyer, *Boarder Babies in District of Columbia Hospitals: Report of the Mayor's Advisory Board on Maternal and Child Health*, (Sept. 6, 1989).

[14] The information on drug addiction among newborns is drawn from MacGregor, *et. al.*, *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, Obstetrics & Gynecology, Vol. 74, No. X, 1989 and Chasnoff, *et. al.*, *Cocaine Use in Pregnancy, Perinatal Morbidity and Mortality*, Neurotoxicology and Teratology, Vol. 9, pp. 291-293, 1987. (continued...)

cocaine-addicted infants also suffer from abnormally low birth weight (the leading cause of infant mortality), meconium aspiration (a fetus' ingestion of its own bodily wastes), and repeated seizures. In addition to numerous cases of permanent and severe brain damage, most crack babies typically suffer from small head circumference, restricting the space in which the brain may normally develop. Despite the heroic efforts of physicians and pediatric nurses, a large number of these children die. Many of those that do survive will live out their lives severely handicapped as a result of their mothers' use of cocaine. There is no reason to believe that many babies born in hospitals in or near Oak Park, Michigan, where petitioner plied his trade, have been spared this horrific suffering.

The slaughter from the drug plague has driven society to demand, and rightly so, strict measures to stem the tide of illegal narcotics. A full thirty-eight percent of the public believes that convicted drug dealers not guilty of a specific murder should be subject to the death penalty.[15] According to Gallup Poll data, the number of persons believing that drug abuse is the

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[14](...continued)

[15] U.S. Department of Justice, 1988 *Sourcebook of Criminal Justice Statistics*, 223. Nothwithstanding this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977), an argument can be made that capital punishment for major drug dealers can be constitutionally applied even where no specific death can be shown to have resulted from that crime. *See* Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-enforcement*, 24 Wake Forest L. Rev. 881, 890-91 (1989).

most serious problem our nation faces has grown from two percent in 1985 to twenty-seven percent in 1989.[16]

As best they can, law enforcement agencies are responding to this crisis. Drug arrests in the United States have risen from 640,000 in 1985 to 994,000 in 1988.[17] Seizures of illegal drugs are also up sharply. In 1988 the Drug Enforcement Administration and the Coast Guard seized over sixty-seven tons of cocaine, 780 tons of marijuana, and one ton of heroin.[18] Despite this modest success in seizing narcotics, federal, state and local law enforcement agencies remain overwhelmed in the face of a vast demand for illegal drugs. According to Rep. Charles Rangel, Chairman of the House Select Committee on Narcotics Abuse and Control, Americans spent $140 billion on drugs in 1987. This included 60,000 tons of marijuana, 178 tons of cocaine, and twelve tons of heroin.[19]

With illegal drugs so widely available, and with billions of dollars in business available to enterprising and ruthless drug criminals, it is not surprising that people like petitioner are eager to embark on what they see as a quick path to easy money. What is astonishing, however, is that Ronald Harmelin should be surprised at the severity of his punishment. After all, his punishment is based solely upon the enormous pain and suffering that a large amount of cocaine causes: from the crack baby with brain damage to the elderly person

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[16] *The Washington Times*, Sept. 4, 1990, at A8.

[17] *Leading Drug Indicators, supra*, note 10 at 29.

[18] *The Washington Times*, Sept. 4, 1990, at A8. *See generally The National Narcotics Intelligence Consumers Committee Report*, June 1990.

[19] "GAO Cites Cost of Drug Use in U.S.," *The Washington Post*, March 2, 1988.

robbed for the money to buy dope, from the teenagers mowed down in drive-by shootings to the women who engage in prostitution as a means to support their drug habit.

Petitioner's crime was not directed solely against one person, but rather it was directed against all the people of Michigan, who every day live in the ominous shadow of illegal drugs. Drug dealing -- the crime petitioner is guilty of -- is a crime against humanity. Former Associate Justice Powell summed it up well when he said that "A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault." *Rummel v. Estelle*, 445 U.S. 263, 295, n. 12 (1980) (Powell, J., dissenting).

There is a clear nexus between illegal drugs and other forms of violent criminal behavior. There is an indisputable connection between the business of drug dealers and the anguish of children born addicted to cocaine. There is a direct correlation between petitioner and the suffering of innocents. For the victims of illegal drugs, Michigan is simply doing justice from both a retributive as well as deterrent perspective by keeping Ronald Harmelin behind bars for the rest of his life.

B. Severity of Petitioner's Punishment.

Petitioner makes a highly emotional argument that his sentence of life without parole really "means life without parole" and that because of the punishment meted out on him, his life has been "shattered beyond all hope." Pet. Brief at 5, 8.

Petitioner would like this Court to believe that his sentence means that he will die in prison. While petitioner may not be paroled in the same manner as other Michigan prisoners, the governor of Michigan retains

the power to commute his sentence to one that includes parole. Michigan's drug lifer law is only twelve years old, and almost all of those sentenced under it have been sentenced within the past few years. Hence, they have not seved long enough in order to yet merit consideration of executive commutation of their sentences.[20]

In other states that long ago adopted life without parole sentences almost identical to Michigan's, such as Nebraska and Massachusetts, persons sentenced to "life without parole" routinely have their sentences commuted to life with possibility of parole after lengthy periods of confinement. *See* Welch, *Can This Be Life? The Implications of Life Without Parole*, Corrections Compendium at 8 (Feb. 1987).

Petitioner also asserts that he has been deprived of all hope, and that his life has been destroyed by the sentence imposed upon him. *Amici* are not sympathetic. Nowhere in the Constitution is this Court given the warrant to reduce a sentence because the justices may feel sorry for a convicted criminal. Any sympathy this Court may feel would be better directed toward the innocent victims whose lives have been destroyed by illegal drugs.

If life without the possibility of parole is indeed a qualitively different aspect of the punishment which makes this sentence more severe than all others except the death penalty, then courts would also have to place *de facto* life sentences in that category as well. A 60-

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[20] According to Michael Hodge, legal adviser to Michigan Governor James Blanchard, a second-degree murderer sentenced to life imprisonment in Michigan typically serves seventeen years of his sentence before release. Since Michigan's drug lifer law is only twelve years old, Hodge has said that it would be inappropriate to begin to consider executive commutations for drug lifers for five more years. "Lawmakers Quietly Consider Change," *The Detroit Free Press*, March 24, 1990, at 7E.

year old drug dealer who is given a 60-year prison term, even with the possibility of parole after serving one-third of that time, has been effectively given a life sentence. Here, petitioner was 42-years old when he was convicted; according to actuarial tables, his life expectancy is approximately is 30 more years. American Council of Life Insurance, *1988 Life Insurance Factbook* 98. Does that mean any term of years greater than the defendant's life expectancy is a severe sentence under the *Solem* analysis? If so, what about a 5-year mandatory term sentence imposed on a first time offender who is suffering from AIDS or has a terminal illness where every medical prognosis was that the person had only a year to live? That sentence would surely constitute a life sentence without the possibility of parole. Such a defendant could just as easily argue as petitioner, if not even more so, that "he will die in prison," and that he will not be able to be "reunited with . . . his loved ones . . . making up for lost time." Pet. Brief at 32. Such pleas, *amici* submit, are best made to the executive branch in clemency or commutation proceedings rather than to the courts.

C. Severity of the Punishment in Other Jurisdictions.

In his listing of other states' maximum sentences for possession of 650 grams of cocaine, petitioner often compares apples with oranges. Michigan's drug lifer law is designed to punish not solely the possession of cocaine, but also possession *with intent to distribute*.[21]

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[21] Petitioner has admitted in his own brief that he did not merely possess the 672 grams of cocaine, but instead intended to distribute and transfer the drugs to others. *See* note 5, *supra*. Thus, the

(continued...)

A large number of the state sentences cited by petitioner in his appendix as authorized by other states are for possession only. Petitioner fails to make it clear that the separate penalties for possession with intent to distribute make the true punishments of those states much higher.

The legislative history of the statute indicates that the law was designed to punish traffickers, not just possessors, and that the penological goal was one of incapacitation:

> The bill would ensure that persons convicted of drug dealing spend substantial periods of time in prison. By keeping drug dealers off the streets for longer periods of time, it will help to reduce illicit drug activity.

Argument for Passage of the Drug Lifer Law, Wayne State University, Analysis of Michigan H.B. 4190, March 16, 1977, p. 3, reproduced at Pet. App. 12-13. And as previously noted, possessing more than 650 graams of cocaine easily suggests an intent to distribute the drug. *See* note 7, *supra*.

Michigan's drug lifer law was enacted in the full knowledge that the proposed penalties were tough, yet the legislature felt that the damage caused by illegal drugs was so severe as to merit stiff punishment:

> All of society is a victim of the illicit drug scene. Not only does widespread narcotic addiction cause a serious loss of human resources, but black-market drug dealing creates a spiral of drug-related crime. The magnitude of

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[21](...continued)
comparison of his crime with the crime of simple possession is entirely inappropriate.

> the narcotics problem in Michigan necessitates tougher law enforcement policies. *The penalties imposed by the bill for major drug dealing are severe, but they are not inappropriate in terms of the harm drug dealers do to society.*

Id. at 2-3 (emphasis added).

This law is not one aimed at the casual user of cocaine. Indeed, no casual addict could afford the $60,000 to $100,000 cost of the 672 grams of cocaine that petitioner possessed. Rather, this law has its effect on those -- like petitioner -- who are engaged in the criminal business of drug trafficking.

Petitioner's sentence, therefore, should only be compared with other jurisdictions' sentences for drug trafficking, not with simple drug possession. In this respect, Michigan's law, while tougher than other jurisdictions, is not egregiously so. Several jurisdictions subject first offenders to life and life without paroie sentences for drug trafficking,[22] and many more provide for lengthy mandatory sentences that exceed the natural life expectancy of petitioner.[23]

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[22]These jurisdictions include Alabama, Arkansas, Connecticut, Idaho, Kansas, Missouri, Nevada, New York, North Dakota, Oklahoma, Tennessee, and Texas. *See* Ala. Code §§ 13A-5-6(a)(1), 13A-12-231(2), (10), 13A-12-232 (life without parole); Ark. Stat. Ann. § 5-64-401(a)(1)(i), (d); Conn. Gen. Stat. § 21a-278(a); Idaho Code § 32-2732(a)(1)A; Kan. Stat. Ann. § 65-4101 *et seq.*; Mo. Rev. Stat. § 195.010 *et seq.*; Nev. Rev. Stat. § 453.3395(3); N.Y. Penal Law § 220.21; N.D. Cent. Code § 19-03.1 *et seq.*; Okla. Stat. tit. 63, § 2401; Tenn. Code Ann. § 39-6-401 *et seq.*; and Tex. Health Code § 481.112.

[23] If petitioner would have been sentenced in many of the states where his crime is not punishable by life imprisonment, his mandatory sentence for trafficking over 670 grams of cocaine may approach or exceed his life expectancy, thereby resulting in a *de*
(continued...)

Because we have a federal system of government, one state will always have the distinction of being toughest in its treatment of persons violating a certain law. While Florida courts often impose the death penalty for first degree murder, courts in New York are limited by law to a sentence of 25 years to life. Does this mean that the death penalty is unconstitutional because Florida may punish murderers more harshly than does New York? Of course not. Michigan has enacted the nation's toughest law against large-scale drug trafficking. It has done this precisely because the people of Michigan want the merchants of drug death to be removed from society permanently.

Petitioner has no one to blame but himself for his predicament. He brought his life sentence upon himself by his own role in drug trafficking, a role that shows utter disregard for human life.

II. THE CONSTITUTION DOES NOT REQUIRE INDIVIDUALIZED SENTENCING IN NON-CAPITAL CASES.

Petitioner and his *amici*[24] claim that petitioner's sentence was cruel and unusual because the Eighth Amendment requires sentences imposed by trial courts for non-capital crimes must be individualized to fit the

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[23](...continued)
facto life sentence. *See, e.g.*, Ga. Code Ann. § 16-13-31 (mandatory minimum 25 year sentence for trafficking in more than than 400 grams of cocaine); N.C. Gen. Stat. § 90-95(h)(3)(C) (35 years mandatory minimum for trafficking 400 grams or more); S.C. Code Ann. 44-53-370(e)(2)(e) (25 year minimum for trafficking more than 400 grams). This list, of course, does not include the many states where he could have received a discretionary sentence of longer than 30 years.

[24]*See* Brief of *amici curiae* National Association of Criminal Defense Lawyers, *et. al.*

specific circumstances of the criminal and his crime. This argument is utterly without merit. Neither the Constitution nor the decisions of this Court require the tailoring of non-capital sentences to the individual defendant.

Petitioner spends a large portion of his brief trying to establish the curious notion that a sentence of life in prison without parole -- with the people of Michigan paying for his room, board, medical care, and recreational facilities -- is equivalent to a sentence of death by electrocution. Pet. Brief at 21-27. Having made this argument, petitioner would then have this court fashion a new, extra-constitutional rule that would mandate that the imposition of tough non-capital sentences be governed by legal standards identical to death sentences.

This Court has applied the requirement of individualized sentencing only in the context of death penalty cases. *See e.g. Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978).

Chief Justice Burger's opinion in *Lockett* is especially instructive on this point:

> [L]egislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases...
>
> We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.

Id. at 604-05.

While petitioner goes to great lengths to equate his mandatory life sentence with that of a mandatory death sentence, this Court's decisions in death penalty cases

have consistently set forth that the difference between incarceration and execution is so great that individualized treatment is necessary only for those subject to execution:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponsing difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *see also Lockett v. Ohio*, 438 U.S. at 604 (plurality opinion).

In his argument that the Constitution requires individualized sentencing in non-capital cases, petitioner would have this Court mandate individualized sentencing, a concept which has been specifically rejected by numerous states as well as the Congress of the United States. In enacting the Sentencing Reform Act of 1984, the Congress eliminated individualized sentencing in non-capital cases and enacted a system which removes virtually all sentencing discretion from the hands of federal judges.[25] The national trend in sentencing, as reflected in the federal sentencing scheme and in many states for serious, non-capital crimes, is moving sharply away from individualized tailoring of sentences and toward determinate sentences. Adoption of petitioner's argument would lead this Court to require mandatory appellate review of all non-capital sentences. Not only is this contrary to the adopted

[25] See *Mistretta v. United States*, 109 S. Ct. 647 (1989).

policy of the federal government and of many states, it is an argument that this Court has already rejected. *Solem*, 463 U.S. at 290, n.16.

Adhering to this Court's decision in *Solem*, lower federal courts have consistently ruled against claims made by non-capital defendants who demand individualized sentencing in the manner constitutionally required for capital defendants. The United States Court of Appeals for the Second Circuit, for example, recently rejected the appeal of a convicted drug offender who attacked the non-individualized nature of his sentence, as mandated by the Sentencing Guidelines. Like petitioner here, appellant in that case relied upon this Court's decisions in various death penalty cases to claim that he was constitutionally entitled to individualized sentencing based on his personal characteristics and the circumstances of his crime. The court did not accept this reasoning:

> We reject, given the Supreme Court's capital punishment cases and their language, appellant's argument that it would be arbitrary to distinguish between capital and non-capital cases in this context. . .
>
> In the end, we hold that there is no constitutional right to judicial discretion in individualized sentencing.

United States v. Vizcaino, 870 F.2d 52, 55-56 (2d Cir. 1989) (citations deleted). *See also United States v. Fox*, 889 F.2d 357 (1st Cir. 1989) (no right to individualized sentencing); *United States v. Goodface*, 835 F.2d 1233 (8th Cir. 1987) (individualized consideration not required when sentence is mandatory); and *United States v. Costelon*, 694 F. Supp. 786 (D. Colo. 1988) (Congress has constitutional power to enact mandatory sen-

tences that remove all discretion from sentencing judges).

Indeed, in the due process context, the Court of Appeals for the Sixth Circuit has held that in passing sentence on a convicted felon with no prior criminal record, a state court's imposition of a maximum sentence -- imposed *even without a presentence investigation* -- does not offend constitutional norms. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986).[26]

While some decisions of this Court have cited alleged benefits of individualized and discretionary sentencing in non capital cases,[27] this Court has nevertheless upheld sentences of imprisonment imposed pursuant to mandatory sentences, rejecting the notion that mandatory sentencing violates the requirements of the Constitution. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

Petitioner's equation of life in prison with death is supported by no authority. Instead, he uses emotionalism to shroud his argument in the cloak of his preferred system of penology, one which would constitutionally mandate "good time credits" and early parole as necessary to avoid the imposition of cruel and unsusal punishments. Even if, for the sake of argument, petitioner's lenient system did have merit, there is no legal reason for it to be constitutionally required. If petitioner does not like Michigan's sentencing scheme, his proper remedy is to lobby the Michigan legislature to change the law, or to seek a commutation.

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[26] While petitioner's argument is advanced solely under the Punishments Clause of the Eighth Amendment, his reliance upon death penalty cases -- in which the arguments are often framed in the due process context -- makes some amount of due process consideration useful.

[27] *See Williams v. New York*, 337 U.S. 241 (1949) and *Lockett*, 438 U.S. at 602-03 (plurality opinion). As previously noted, Chief Justice Burger's plurality opinion in *Lockett* specifically recognized that individualized sentencing is *not* constitutionally required in the non-capital context.

Regardless of whether or not this Court agrees with the wisdom of Michigan's "drug lifer" law, it is well within the power of state governments to proscribe and severely punish conduct which so devastates the fabric of society. The observation of Mr. Justice Stewart on the availability of life sentences for felony recidivists in Texas illustrates this point well:

> If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. . . [T]he question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court.

Spencer v. Texas, 385 U.S. 554, 569 (1967) (Stewart, J., concurring).

Petitioner's attempt to read his personal preferences into the Constitution should be rejected.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the lower court be upheld.

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NO. 89-7272

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

RONALD ALLEN HARMELIN,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN

BRIEF OF AMICUS CURIAE STATE OF ARIZONA IN SUPPORT OF THE RESPONDENT, STATE OF MICHIGAN

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Question Presented

Should this Court revisit Solem v. Helm, because it has opened the floodgates to appellate review of sentences solely of imprisonment and has resulted in conflicting applications of its doctrine?

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INTEREST OF AMICUS CURIAE

Amicus curiae asks this Court to review its decision in Solem v. Helm, 463 U.S. 277 (1983), because that decision has resulted in flagrant overreaching by state and federal courts in redefining crimes and reestablishing punishments therefor; it has allowed courts to act as superlegislatures; and it has wreaked havoc upon law enforcement efforts, which must thereafter be second-guessed by courts on the charge of cruel and unusual punishment. The decision has created conflicts among the various courts of the United States, because the purportedly objective criteria set forth in that decision actually are subjective and result in abrogating legislative intent when sentences solely of imprisonment are reviewed on Eighth Amendment grounds. The Arizona Supreme Court has recently misapplied Solem v. Helm by overturning a sentence of 40 years' imprisonment for two counts of sexual conduct with a minor,

finding that sentence to be unconstitutionally cruel and unusual. State v. Bartlett, ___ Ariz. ___, 792 P.2d 692 (1990). Amicus curiae has asked this Court to review that decision in a petition for certiorari filed September 13, 1990.

SUMMARY OF ARGUMENT

Michigan's statute required that the sentencer sentence petitioner to a mandatory life sentence without the possibility of parole for possessing in excess of 650 grams of cocaine. This Court has held that, in reviewing the constitutionality of a sentence, objective criteria must be considered; however, this "objective criteria" is not objective, and their use results in conflicting eighth amendment analyses. Mandated consistency of sentences for like crimes destroys all notions of federalism inherent in the United States Constitution, and permits courts to redetermine sentences determined appropriate by the constituents of the states enacting legislation.

Amicus submits that this Court should overrule Solem v. Helm and allow states to determine what acts should be criminal and what punishments are appropriate for the commission of those acts, without resorting to a national standard, and without imposing techniques of comparison that destroy all notions of federalism. Except in those rare instances contemplated by the eighth amendment, courts should not undertake proportionality review of sentences solely of imprisonment.

ARGUMENT

IN MAKING A BREAK FROM TRADITIONAL EIGHTH AMENDMENT[1] ANALYSIS BY EXAMINING SENTENCES OF IMPRISONMENT, AS WELL AS THE MANNER IN WHICH SENTENCES ARE CARRIED OUT, SOLEM v. HELM SET FORTH AN UNWORKABLE TEST TO DETERMINE WHETHER A GIVEN SENTENCE IS PROPORTIONAL TO A GIVEN CRIME; THIS HOLDING CREATED A JUDICIAL ABERRATION, WHICH THE DISSENT FORESAW WOULD RESULT IN CONSTITUTIONAL CHAOS, A RESULT THAT HAS COME TO PASS.

A. HISTORY DEMONSTRATES THE JUDICIAL EVOLUTION THAT OCCURRED BETWEEN RUMMEL v. ESTELLE AND SOLEM v. HELM.

In Rummel v. Estelle, 445 U.S. 263 (1980), this Court specifically rejected the invitation to extend eighth amendment analysis to challenges solely of sentences of imprisonment, finding:

> Given the unique nature of the punishments considered in Weems [v. United States] and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for

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1. The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

> crimes concededly classified andclassifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel, 445 U.S. at 274. This Court found it difficult, if not impossible, to differentiate between one term of years for a specific crime and another term of years, and refused to engage in that "line-drawing" that is peculiarly the province of the legislatures. Id. at 275. Rummel specifically asked the Court to apply "objective" criteria to determine that his sentence was out of sync with the majority of states whose sentencing provisions were markedly different from the recidivist statute under which he was sentenced to life imprisonment. The majority of this Court rejected these objective criteria, saying:

> Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.

Id. at 283.

Three years later, this Court issued its opinion in Solem v. Helm, 463 U.S. 277 (1983), in which it appeared to embrace the objective criteria it had recently rejected in Rummel, without overruling that decision. In Solem, this Court set forth an "objective" test to determine whether a given sentence was proportional to a given crime. Factors that a court should consider include:

> (1) Looking at the gravity of the offense and the harshness of the penalty;
>
> (2) Comparing the sentences imposed on other criminals in the same jurisdiction; and
>
> (3) Comparing the sentences imposed for the same crimes in other jurisdictions.

Id. at 290-91. The Court completely unraveled its prior precedent and opened the doors to proportionality challenges such as the one before this Court.

B. CHIEF JUSTICE BURGER'S PROPHECY HAS BECOME REALITY.

The concerns outlined by the Rummel majority are the same as those concerns

expressed by Chief Justice Burger, writing for the four-member dissent in Solem v. Helm. Chief Justice Burger wrote:

> The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of stare decisis, trespasses gravely on the authority of the states, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases.

Solem v. Helm, 463 U.S. at 304. Chief Justice Burger warned that the majority's decision in Solem would allow appellate judges to substitute their own sense of what is proportional and what is not proportional, undermine the authority given to legislatures to define crimes and determine punishments, and subject all sentences of imprisonment to appellate scrutiny. Id. at 305.

Chief Justice Burger, pointing out the futility of comparing disparate crimes and punishments, reiterated:

> It is one thing for a Court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a Court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix.

Rummel, 445 U.S. at 281. The Chief Justice warned that making comparisons among the various states tramples on the fundamental concepts of federalism, and ignores the implication of various legislatures' recognition of different societal interests. Such comparisons are thus rendered speculative at best.

Chief Justice Burger attempted to set forth some hypothetical examples of what the future would bring:

> Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price fixing? The permutations are endless and the Court's opinion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes.

Solem v. Helm, 463 U.S. at 314-15.

Just as Chief Justice Burger warned, the majority's opinion in Solem v. Helm provided no guidelines for implementation of the tests set forth therein. There is no meaningful way to measure the weight to be given to certain offenses, or the legislative intent behind the enactment of certain penalties. The Chief Justice feared that the majority's decision would flood appellate courts with cases challenging sentences on eighth amendment grounds and "administer the coup de grace to the courts of appeals as we know them." Solem v. Helm, 463 U.S. at 316. As the statistics reported below demonstrate, the Chief Justice's fears have indeed become a reality, as the appellate courts have been flooded with challenges to the proportionality of sentences, following the Solem v. Helm decision.[2]

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2. As of September 5, 1990, there were 772 reported decisions citing Solem v. Helm. Of those cases reviewed, it is

However, actual comparisons among states are impossible, given the varieties of sentences available for a variety of different criminals. Numerous factors play upon what any given defendant may receive as a sentence for a similar crime. These variables and permutations complicate and obscure any meaningful analysis, and demonstrate the

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(Footnote 2 continued)

apparent that various state and federal courts interpret the mandate of Solem differently. Some interpret the case to require review only of sentences of life imprisonment without the possibility of parole [Maddox v. State, 502 So. 2d 790 (Ala. 1986); McLester v. State, 460 So. 2d 870, 873-75 n.2 (Ala. Crim. App. 1984); Webb v. State, 539 So. 2d 343 (Ala. Crim. App. 1987); Donahoo v. State, 505 So. 2d 1067 (Ala. Crim. App. 1986). See United States v. Rhodes, 779 F.2d 1019, 1027-28 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986)]; while others seem to put each sentence before it through the rigors of a Solem analysis. A comparison of the different interpretations of the eighth amendment spawned by Solem is discussed infra at 11-14.

lack of objectivity inherent in the tests outlined by the Solem Court.

C. COURTS HAVE PLACED DIFFERENT INTERPRETATIONS UPON THE DOCTRINE SET FORTH IN SOLEM v. HELM, THEREBY MAKING COMPARISONS REQUIRED THEREUNDER IMPOSSIBLE.

As mentioned earlier, there is a vast uncertainty among state and federal courts about the meaning of the tests set forth in Solem v. Helm, and the cases to which they apply. In Marrero v. Wainwright, 823 F.2d 1468, 1470 (11th Cir. 1987), the Eleventh Circuit Court of Appeals rejected the argument propounded by the government that only those cases involving ineligibility for parole were subject to review under Solem.

In contrast to the Marrero decision, the Alabama courts and the Fourth Circuit Court of Appeals have held that the Solem v. Helm analysis is to be applied only in cases involving sentences of life without the possibility of parole. See footnote 2, supra.

In the case before this Court, the Michigan Court of Appeals found it unnecessary even to address the applicability of Solem v. Helm, or to put the facts of this case through the rigors of Solem's analysis.

In Maryland, when applying the second prong of the Solem v. Helm test, the court compares defendants who have committed crimes within the same category of offenses. See State v. Davis, 310 Md. 611, 530 A.2d 1223 (Md. 1987). The Maryland court looks at particular categories of crimes, and the punishments set forth therefor. If all defendants who commit a particular class of crime are sentenced similarly, the inquiry ends under this prong of the Solem test. The Ninth Circuit Court of Appeals has interpreted Solem and upheld sentences challenged under the second prong, because all offenders who committed crimes while released from confinement

were treated alike. Cocio v. Bramlett, 872 F.2d 889 (9th Cir. 1989). By contrast, the Arizona Supreme Court held that a court must look at punishments for any and all crimes that can be committed within a jurisdiction to meet the Solem test. State v. Bartlett, 792 P.2d 692, at 699 (Ariz. 1990).

Under the third prong of Solem, both Maryland and the fourth circuit subscribe to the interpretation that Solem requires a comparison of what sentences could be imposed in other jurisdictions, not merely what sentences actually have been imposed. State v. Davis; United States v. Rhodes; Teeter v. State, 499 A.2d 503 (Md. App. 1985). By contrast, the Arizona court stated it must look at other sentences actually imposed, to meet the Solem test. Bartlett, 792 P.2d at 700-03.

In Bartlett, the Arizona Supreme Court overturned a sentence of 40 years'

imprisonment for two counts of sexual conduct with a minor, after applying the "objective" criteria of Solem. In analyzing those factors, the court redrew lines set by the legislature in determining the severity of the offense; chose a non-related group of offenders in Arizona to compare sentences of varying severity; and limited its inquiry under the third prong of the test to cover only sentences actually imposed in other jurisdictions for identical crimes, where factors of mandatoriness, parole eligibility, age of victims, repeat offender classifications, and identity of elements all coalesced. State v. Bartlett, 792 P.2d 692. It then formulated a remedy that has resulted in the defendant being sentenced to less than the statutory minimum for the crimes he committed.

Even though this Court has said that successful challenges to the

proportionality of particular sentences are "exceedingly rare," courts are nevertheless succumbing to challenges of sentences solely of imprisonment, without giving the deference required by this Court and the United States Constitution to the legislatures who define crimes and the punishments therefor.

The result is that courts are now allowed to redefine crimes and in essence determine whether the conduct proscribed by one state also may be proscribed by others. Even if a court finds that certain conduct may be proscribed by one state while it is lawful in another, under a Solem v. Helm challenge, the sentence may be found unconstitutional, because there are only a few other states that prohibit the conduct. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (Georgia's prohibition of consensual sodomy does not violate rights of privacy and sodomy may be made criminal). Thus,

while the conduct may be lawfully prohibited, under a Solem v. Helm analysis, it may not be constitutionally punished, because it may fail under Solem's third prong.

Petitioner misdirects this Court when it asks it to compare death penalty analysis to the analysis in cases such as his. It is instructive, however, to note that, in death penalty cases, this Court has repeatedly held that a proportionality review (such as Solem mandated) is unnecessary. McClesky v. Kemp, 481 U.S. 279 (1987); Pulley v. Harris, 465 U.S. 37 (1984). It seems odd that, in cases where the ultimate punishment is imposed, proportionality review is not required; however, in cases not involving the death penalty, but subject to great variations in punishments for differently defined crimes, such analysis is required.

It is time for this Court to review its decision in Solem, because of the effect that decision is having on law enforcement, and because of the judicial activism that it is fostering. As a result of the opinion, great conflict now exists across the country among courts regarding the appropriate cases to which to apply Solem v. Helm, and in cases in which that doctrine is "applied," inconsistent results are occurring. In its present framework, Solem v. Helm is unworkable, and either should be modified or overruled.

CONCLUSION

Courts are misinterpreting and misapplying the doctrine set forth in Solem v. Helm. They are using that opinion as a vehicle through which to change judicially unpopular laws and mandatory sentences required thereunder. Because the criteria are really subjective, judges have no guidance in

applying them in given situations. Thus, amicus asks that this Court overrule Solem v. Helm, or modify it to afford litigants needed guidance in doing meaningful analyses under the eighth amendment.

Amicus curiae asks this Court to affirm the judgment of the Michigan Court of Appeals.

Respectfully submitted,

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